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81 -2292

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AIR EXPRESS INTERNATIONAL CORPORATION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Dated: June 11, 1982

QUESTION PRESENTED FOR REVIEW

Whether the court below erred in enforcing, contrary to the position taken by three other circuit courts of appeals, an order of the National Labor Relations Board requiring an employer, found to be in violation of the National Labor Relations Act for its refusal to offer many of its unionized employees a transfer to a relocated and merged facility, to recognize the union at the new facility when that order is based on a *presumption* that absent the commission of the unfair labor practices all the employees would have transferred to the new facility and would have constituted a majority of the bargaining unit?

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of the Supreme Court Rules, the following is a list of all subsidiaries (other than wholly owned subsidiaries) of Air Express International Corporation. There are no parent companies or affiliates to report.

Name of Subsidiary	*Place of Incorporation*
Wings & Wheels (H.K.) Ltd.	Hong Kong
Air Express International	France
Air Express International (PHIL.) Inc.	Philippines
Olson & Wright/Air Express International Inc. A/S	Denmark
Maruzen Air Express International Ltd.	Japan

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AIR EXPRESS INTERNATIONAL CORPORATION,

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—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Air Express International Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in this case on March 15, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 659 F.2d 610 (5th Cir. Unit B 1981) and is reproduced in Appendix A of this petition.[1] This opinion was supplemented by an order on

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1 The case was originally decided by the Fifth Circuit Court of Appeals. Pursuant to the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994, the former Fifth Circuit was divided into the Fifth Circuit and the newly created Eleventh Circuit. The case at bar, arising out of Georgia, is now under the aegis of the Eleventh Circuit.

reconsideration and on cross-motions for entry of judgment reported at 670 F.2d 512 (5th Cir. Unit B 1982) which is reproduced in Appendix B of the petition. The Decision and Order of the National Labor Relations Board, issued on September 27, 1979, together with the decision of the Administrative Law Judge, are reported at 245 N.L.R.B. 478 (1979) and are reproduced in Appendix C of this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 1982. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved is the National Labor Relations Act, *as amended*, 29 U.S.C. § 151, *et seq.* (hereinafter "the Act"). Section 7 of the Act, 29 U.S.C. § 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . .

Sections 8(a)(1), (3) and (5) of the Act, 29 U.S.C. § 158(a)(1), (3) and (5), state in pertinent part:

> 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> • • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 9(a) of the Act, 29 U.S.C. § 159(a), provides in pertinent part:

9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . .

Section 10(c) of the Act, 29 U.S.C. § 160(c), provides in pertinent part:

10(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . .

STATEMENT OF THE CASE

Air Express International Corporation (hereinafter "AEI") is engaged in national and international air freight forwarding. Prior to 1978, AEI had been foundering economically and was on the verge of bankruptcy in 1973, 1975 and again in 1976. AEI's recurrent losses were caused by its inability to expand its share of the domestic market. In order to improve its economic condition, AEI entered into an agreement to buy most of the assets of Trans-Air Freight System, Inc. (hereinafter "Trans-Air"), an air freight forwarding operation with facilities in fifteen cities. Trans-Air's strength was its domestic operation, especially in the southeastern United States where AEI's domestic operation was particularly weak. Eighty-five percent of AEI's business was international air freight forwarding while eighty-five percent of Trans-Air's business was domestic air freight forwarding. It is undisputed that the acquisition of Trans-Air and the relocation and merger of the East Point, Georgia facility at College Park, Georgia was motivated by valid economic reasons.

The acquisition of Trans-Air by AEI was consummated on February 10, 1978 immediately after obtaining the necessary approval of the Civil Aeronautics Board. Until February 10, 1978, AEI maintained a facility in East Point, Georgia, outside of Atlanta. On February 10, 1978, AEI ceased operations at East Point and commenced its new operations in Trans-Air's facility (augmented by additional space leased by AEI) in College Park, Georgia, about 7 to 10 miles from East Point.[2] Also on February 10, 1978, AEI terminated four of its six nonsupervisory, non-sales personnel at East Point, i.e., James McCollum, John Shepherd, Lynn Ashmore and Marlin Rozier. The fifth East Point employee, Kathy Lee, was transferred

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2 East Point was smaller in size than College Park and had an unusual shape that was not conducive to efficient operations. College Park was better suited than East Point for domestic forwarding, which AEI hoped to strengthen as a result of the acquisition of Trans-Air.

from East Point to AEI's newly-acquired facility in College Park. The sixth employee, John Moore, who initially refused to accept a supervisory position at College Park, subsequently accepted the position at the new facility in March, 1978.

Pursuant to AEI's acquisition of Trans-Air and the relocation of its operations to College Park, AEI retained eight non-supervisory, non-sales employees of Trans-Air.[3] The Trans-Air employees were not unionized.

On December 14, 1977, two months prior to AEI's acquisition of Trans-Air and its relocation to College Park, the National Labor Relations Board certified the Truckdrivers and Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter "Local 728") as the collective bargaining representative of:

> All dockmen, drivers, and agents employed by the Employer at its operation at 1165 Willingham Drive, East Point, Georgia, but excluding all sales personnel, confidential employees, professional employees, guards and supervisors as defined in the Act.

Following the acquisition and relocation, AEI withdrew recognition from Local 728 and refused to bargain with it at the College Park facility on the ground that it did not represent a majority of the employees in a appropriate unit at College Park.

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3 The eight Trans-Air employees retained at College Park following the acquisition and relocation were Carl Herrington, Sue Doyle, Sue Denison, Terry Bowlden, Mike Turner, Ken Ley, David Coker and Paul Norton. In addition, Pam Chidester, a Trans-Air employee who had been on maternity leave since December 1977, returned to work at College Park in early April, 1978, performing secretarial and customer service duties. Also, although AEI's operations at East Point did not have a switchboard, a switchboard was installed at AEI's new operation at College Park and a person was hired to perform operator and receptionist duties.

On February 13 and 14, 1978, Local 728 filed a charge and an amended charge, respectively, with the National Labor Relations Board (hereinafter "NLRB" or "Board"). On April 4, 1978, the General Counsel of the NLRB issued a complaint alleging that AEI had violated sections 8(a)(1), (3), (4) and (5) of the Act by, *inter alia*, discharging Lynn Ashmore, John Moore, Marlin Rozier, John Shepherd and James McCollum, and by refusing to recognize and bargain with Local 728 as the exclusive bargaining representative of the employees at AEI's new College Park facility. On April 21, 1978, the Administrative Law Judge consolidated the aforementioned complaint with an earlier complaint which alleged that Nella Ree Dunn, a clerical employee at East Point, had been terminated in July 1977 (seven months prior to the relocation) in violation of sections 8(a)(1) and (3) of the Act.

In its Decision and Order issued on September 7, 1979, the Board held that AEI had committed various unfair labor practices. Pertinent to this petition, the Board found that AEI had unlawfully terminated the employment of the six East Point employees in violation of sections 8(a)(1) and (3) of the Act because of their union activity. The Board ordered AEI to offer reinstatement to the six employees and to make them whole for losses they suffered by reason of the discrimination against them. (Appendix C).

The Board also held that Local 728's certification as the exclusive collective bargaining representative at the East Point facility would apply to the new operation at College Park. The Board based its holding on the *presumption* that, absent the unfair labor practices, the six East Point employees would have transferred to College Park, and, together with Kathy Lee who had been transferred from East Point to College Park, would have constituted a majority of the bargaining unit at College Park.[4]

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4 The Board found that, absent the unlawful terminations, AEI would have staffed the College Park facility with unionized East Point employees together with a sufficient number of former Trans-Air

The Board ordered AEI to recognize, and, upon request, bargain with Local 728 as the exclusive representative of all College Park employees in the bargaining unit that was found appropriate in the East Point certification.

On November 20, 1979 AEI filed a Petition for Review and to Set Aside the Board's Decision and Order in the Fifth Circuit Court of Appeals. The NLRB cross-petitioned for enforcement of the Board's order. In its decision, dated October 19, 1981, the Fifth Circuit Court of Appeals affirmed the finding of the Board that the six East Point employees were terminated in violation of sections 8(a)(1) and (3) of the Act. It also enforced the Board's order that AEI recognize and bargain with Local 728 at College Park. The Court of Appeals' finding of majority status for Local 728 at College Park was based on the acceptance of the same *presumption* utilized by the Board, i.e, that, absent the unfair labor practices, the six East Point employees would have transferred to College Park and would have constituted a majority of the College Park bargaining unit.[5]

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employees to bring the College Park facility up to its full complement. The Board concluded that but for the violations of the Act there would have been a bargaining unit of ten employees at College Park, of which a majority of seven would have been former East Point employees who had been represented by Local 728 at the East Point facility.

5 The Court of Appeals found that one of the former Trans-Air employees, deemed to be a supervisory employee by the NLRB, was not a supervisor and, thus, properly includable in the College Park bargaining unit. As a result of its redefining the scope of the College Park bargaining unit, the court below held that but for the unlawful terminations, there would have been an eleven member bargaining unit at College Park comprised of a majority (seven) of former East Point employees who had been represented by Local 728 at East Point.

The Fifth Circuit cites *NLRB v. Fabsteel Co.*, 587 F.2d 689 (5th Cir.), *cert. denied*, 442 U.S. 943 (1979) and *NLRB v. Houston Distribution Services, Inc.*, 573 F.2d 260 (5th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1979) to support its use of the presumption that, absent the violations of the Act, the East Point employees would have transferred to College Park, and to, thereby, justify its finding of a continued union majority at the College Park facility. These cases, however, involve a successor employer assuming ownership of the same

AEI does not challenge that part of the Board's order to offer reinstatement and to "make whole" the six former East Point employees. AEI does challenge that part of the Board's order requiring AEI to recognize Local 728 at the College Park facility as an abuse of the Board's discretion to fashion a remedy under Section 10(c) of the Act, 29 U.S.C. § 160(c), and as an undue infringement on the section 7 rights of the unrepresented College Park employees to join or refrain from joining a labor organization.

REASONS FOR GRANTING THE WRIT

The NLRB's order that AEI recognize Local 728 as the exclusive collective bargaining representative of the employees working at the College Park facility, as enforced by the Fifth Circuit, constitutes a flagrant abuse of the Board's discretion in remedying unfair labor practices under Section 10(c) of the Act. Furthermore, the Board's and the Fifth Circuit's use of a *presumption* to prove that Local 728's majority status continued at College Park and, thereby, justified the issuance of a bargaining order at College Park, is inconsistent with the section 7 rights of the College Park employees; is punitive rather than remedial in nature; and is contrary to the decisions of three other circuit courts.[6]

While purporting to restore the *status quo ante*, the bargaining order not only fails to effectuate the policies of the National Labor Relations Act, it has the opposite effect of needlessly quashing the fundamental right of employees, guaranteed by section 7 of the Act, 29 U.S.C. § 157, to bargain collectively through representatives of their own choosing or to refrain from doing so.

A decision by this Court is necessary to resolve the extant conflict among the circuits in order that a uniform Federal law

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facility as the predecessor. The cases do not address the issue presented here, involving a merger coupled with a relocation to another facility.

6 *NLRB v. National Car Rental System*, 672 F.2d 1182 (3d Cir. 1982); *Fraser & Johnston Company v. NLRB*, 469 F.2d 1259 (9th Cir. 1972); *Cooper Thermometer Company v. NLRB*, 376 F.2d 684 (2d Cir. 1967).

be established which defines the scope of the NLRB's authority to order bargaining with a union at an employer's relocated and merged facility where it is uncertain and speculative at the time of the order whether the union represents a majority of the employer's work force in the new facility.

The NLRB and the Fifth Circuit's Use of a Presumption

The opinion below correctly states the well-settled principle that certification of a collective bargaining representative by the NLRB in an appropriate bargaining unit carries with it an irrebuttable, one year presumption that the union continues to enjoy majority status in the bargaining unit, absent "unusual circumstances". (Appendix A-6). *Brooks v. NLRB*, 348 U.S. 96 (1954). "Unusual circumstances" justifying the employer's withdrawal of recognition from a union during the first year of certification arise where changes in the characteristics of a bargaining unit result in its being classified as either a different unit or a nonunit. (Appendix A-7).

The NLRB has consistently held that a certification at one facility applies to another facility, following a relocation of the employer's operations, only if the employee complement at the new facility is comprised of a majority of bargaining unit employees from the former facility. *Westwood Import Co.*, 251 N.L.R.B. 1213 (1980); *Coated Products Inc.*, 237 N.L.R.B. 159 (1978), *enforced*, 620 F.2d 289 (3d Cir. 1980); *Westinghouse Electric Corporation*, 174 N.L.R.B. 636 (1969).[7] *Cf. Burns International Security Services, Inc. v. NLRB*, 406 U.S. 272 (1972) (where this Court held that a successor employer is required to recognize the collective bargaining representative of the predecessor's employees only if those employees comprise a majority of the bargaining unit in the successor's work force); *NLRB v. Pepsi-Cola Bottling Co.*, 613 F.2d 267 (10th Cir.

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7 The court below acknowledged that the employee composition at the new facility following a relocation is normally the most critical factor in characterizing a relocated or merged unit as either the same or a different unit. (Appendix A-9).

1980) (where the decision of the court of appeals impliedly recognized that when there is a change in ownership of a company during the certification year wherein the new owner hires less than a majority of the predecessor's employees, this would constitute "unusual circumstances" relieving the employer of the duty to bargain with the union recognized by the predecessor).

After the Fifth Circuit set forth the principle that the loss of the union's majority status at the new facility would constitute "unusual circumstances", it went on to affirm the NLRB's finding that the majority of the bargaining unit at College Park would have been comprised of bargaining unit employees from East Point. It based this finding on the *presumption* that, absent the commission of unfair labor practices, the East Point employees would have transferred to College Park. (Appendix A-10-11). As a result of the application of this *presumption*, the court below concluded that no "unusual circumstances" existed warranting AEI's withdrawal of recognition of Local 728 at College Park. The NLRB's and the Fifth Circuit's reliance on this *presumption* as a basis for an order to recognize the union at the relocated and merged facility has been specifically rejected by three other circuit courts.

The Decisions of Other Circuits

In *NLRB v. National Car Rental System*, 672 F.2d 1182 (3d Cir. 1982), the Third Circuit recently addressed the very same issue presented in the case at bar. National ceased its operations in Newark, New Jersey and simultaneously relocated its facility, for valid economic reasons, to Edison, New Jersey, 20 miles from the Newark facility. At the time of the relocation, National terminated all thirteen garagemen and mechanics represented by Local 723, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Local 723") working at the Newark facility. National refused to consider these employees for transfer to the Edison facility. The NLRB found that the refusal to transfer employees was motivated by National not wanting

Local 723 to be the bargaining representative at the Edison facility. The NLRB, thus, held that National had violated sections 8(a)(1) and (3) of the Act by discriminatorily refusing to consider the Newark employees for transfer to the Edison facility because of their union activity,[8] and section 8(a)(5) of the Act by refusing to bargain with Local 723 over the effects of the relocation.

The NLRB ordered National to offer employment at the Edison facility to the thirteen former Newark employees who had been discriminatorily denied consideration for transfer to Edison, to dismiss any Edison employees if necessary to make jobs available, and to pay for any lost earnings caused by the discrimination.[9] The NLRB further ordered National to recognize Local 723 as the exclusive bargaining representative of the garagemen and mechanics at the Edison facility. The Board found that the bargaining order was justified because the Edison facility represented a continuation of the operation at the Newark facility. *National Car Rental System, Inc.*, 252 N.L.R.B. 159, 164 (1980). The Board reasoned:

> While no employees from Newark actually transferred to Edison [when it opened,] this result stems directly from [National's] systematic discrimination against the Newark employees. Although the record does not indicate the number of employees who would have been willing to transfer, it does show that several of the 13 unit employees

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8 Although the NLRB and the Fifth Circuit found that AEI unlawfully *terminated* the six former East Point employees, the Third Circuit is correct in labeling the unfair labor practice as a discriminatory *refusal to transfer* the employees to the relocated facility and not as an unlawful termination. The Board has consistently held that, absent an anti-union animus for the relocation, which was never alleged nor shown in the case at bar, there is no obligation on the part of the employer to transfer employees to another facility. *See, e.g., Lee Norse Company*, 247 N.L.R.B. 801 (1980); *The Pierce Governor Company, Inc.*, 164 N.L.R.B. 97 (1967), *aff'd*, 394 F.2d 757 (D.C. Cir.), *cert. denied*, 393 U.S. 831 (1968).

9 This portion of the order was not challenged by National.

> from Newark attempted to do so upon notification of their termination, and that others who testified also indicated their desire to accept employment at Edison . . . [A] fair inference to be drawn from these facts is that, absent [National's] discrimination, [Local 723] would have retained its majority among [National's] employees . . .

252 N.L.R.B. at 164.

The Third Circuit refused to enforce the Board's bargaining order, holding that the order constituted an abuse of the NLRB's discretion.

> Even if we assume that the Board sufficiently articulated its reasons for imposing a bargaining order, and that there is substantial evidence to support the Board's finding that Local 723 would have retained its majority at the Edison facility but for National's unfair labor practice, we think that the imposition of a bargaining order at this point is an abuse of discretion. It is at least premature in view of the fact that the remedial order requires that the thirteen former employees be offered employment at Edison on a seniority basis.If acceptance of this unchallenged remedy should result in a union majority at Edison, there is no evidence that National would not recognize Local 723 as the exclusive bargaining representative for the Edison garagemen and mechanics. It is also possible that the former employees of the Newark facility will not constitute a majority at Edison, even after the other aspects of the Board's remedial order are enforced. Employees not only have the right to bargain collectively, but also to refrain from collective bargaining. See 29 U.S.C. § 157 (1976). Thus, the Board's order in this case may impose a bargaining representative on employees who do not wish to be represented.
>
> * * *

> The Board did not explicitly consider the possibility that its order might impose a bargaining representative on employees who do not wish one. The Board reasoned that, absent National's unfair labor practices, a majority of the Edison employees would have wanted Local 723 to represent them. Not to impose Local 723 as their representative now 'would provide [National] with an impermissible windfall.' 252 NLRB at 164 n.26. However, the Board failed to recognize the injustice in imposing a bargaining representative on employees who are perfectly able to decide whether they want one. Here, the present employees are innocent of any wrongdoing, and some or all of them may lose their jobs because of other aspects of the Board's order. We think the injury that might be done to the rights of the current Edison employees by imposing on them a union they may not want is much greater than the injury that will be done by allowing the possibility that National will avoid a unionized work force. 672 F.2d at 1190-91.

In *Cooper Thermometer v. NLRB*, 376 F.2d 684 (2d Cir. 1967), the employer relocated its operations, for economic reasons, from Pequabuck, Connecticut to a new facility 27 miles away in Middlefield. The employer terminated eighty unionized production and maintenance employees in Pequabuck and refused to bargain with the union over what basis the employees could be employed at the Middlefield facility. The employer did invite the Pequabuck employees to individually apply for jobs at Middlefield, promising to consider the employees equally with other applicants.

The NLRB held that the employer violated section 8(a)(5) of the Act by failing to furnish the union with job data relating to the Middlefield plant, by refusing to negotiate concerning conditions of transfer, and by insisting on dealing with employees on an individual basis. The Board ordered the employer to offer immediate reinstatement and make whole those bargaining unit employees at the Pequabuck plant who were dis-

charged as a result of the company's unlawful actions. *Cooper Thermometer Company*, 160 N.L.R.B. 1902, 1918 (1966). The Board also held that the employer violated Section 8(a)(5) by refusing to recognize the union representing the Pequabuck employees as the bargaining representative at the Middlefield plant. The Board held that it was "not unreasonable to infer" that a majority of Pequabuck employees would have transferred had the employer fulfilled its legal bargaining obligation. 160 N.L.R.B. at 1915-16.

The Second Circuit affirmed the NLRB's order to reinstate and make whole, but denied enforcement of the NLRB's order to recognize and bargain with the union at Middlefield. The Second Circuit rejected the Board's *presumption* that, absent the employer's refusal to bargain, a majority of employees from Pequabuck would have transferred to Middlefield. The court of appeals found the *presumption* to be unwarranted on the basis that even had the company engaged in good faith bargaining, it would have been under no legal obligation to transfer the employees to Middlefield.

In *Fraser & Johnston Company* v. *NLRB*, 469 F.2d 1259 (9th Cir. 1972), the company relocated its operations (again, for economic reasons) from its facility in San Francisco to another facility, 26 miles away, in San Lorenzo, California. The company notified the San Francisco employees that they would be terminated and would not be transferred to the San Lorenzo facility. The company refused to bargain with the three unions representing the San Francisco employees regarding the effects of the relocation.

As in *Cooper Thermometer*, the NLRB ordered the company to reinstate, with back pay, the employees terminated at the San Francisco plant. The Board also ordered that the company recognize and bargain with the three unions (which had represented the discharged employees at the San Francisco facility) at the relocated operation in San Lorenzo. *Fraser & Johnston Company*, 189 N.L.R.B. 142 (1971).

The Ninth Circuit enforced the Board's order to reinstate the terminated San Francisco employees with back pay. It denied enforcement, however, of the Board's holding that the company violated section 8(a)(5) by refusing to recognize the three unions at the San Lorenzo facility.

> It is now established (footnote deleted) that the existence of such an unfair labor practice is dependent upon a finding that a majority of the unions' employees would have transferred to San Lorenzo and thus preserved the unions' majorities had it not been for the company's unfair labor practices.

469 F.2d at 1264. The Ninth Circuit, citing *Cooper Thermometer*, again rejected the Board's use of the *presumption* that, absent the unfair labor practice, a majority of the San Francisco employees would have transferred to San Lorenzo. The Ninth Circuit held that there was insufficient affirmative evidence to sustain the finding that the absence of the union's majority status at the new plant had been caused by the company's unfair labor practice.

The Court of Appeals in *Fraser & Johnston* was influenced by the fact that the NLRB's order to bargain would have imposed a bargaining representative on the current employees at the San Lorenzo facility without reference to their choice. The Ninth Circuit stated that "[t]he right to choose a union is a cornerstone of the National Labor Relations Act." 469 F.2d at 1265.[10]

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10 The court below attempts to distinguish *Cooper Thermometer* and *Fraser & Johnston* from the instant case on the basis of the nature of violations of the Act committed. The Fifth Circuit found that there was much less reason in those cases (involving section 8(a)(5) violations) to presume that employees who did not transfer would have done so absent the particular violations. (Appendix A-10). This distinction, however, is unpersuasive. As the circuit courts held in *Cooper Thermometer* and *Fraser & Johnston*, absent the unfair labor practices, the employers were under no legal obligation to transfer *any* of their employees to the relocated facilities. Consequently, the Second

It is clear that the decision of the Fifth Circuit in the present case enforcing the NLRB's bargaining order is inconsistent with the holdings of the Second, Third and Ninth Circuits. Here, as in the three circuit court cases, the NLRB relied on the *presumption* that, absent the commission of unfair labor practices, the unionized employees would have transferred to the relocated facility in sufficient numbers to constitute a majority of the bargaining unit at the new facility. According to the Board, this *presumption* would justify the imposition of the union on the employees at the new facility and the requirement that the employer recognize and bargain with it. Unlike the Fifth Circuit's endorsement of the use of this *presumption*, however, the Second, Third and Ninth Circuits refused to enforce this unreasonable and unwarranted exercise of the Board's discretion.

The instant case presents even more compelling factors which militate in favor of rejecting the NLRB's order to recognize Local 728 at the College Park facility. To begin with, it is undisputed that the purchase of Trans-Air and the relocation and merger of facilities was for valid economic reasons.

Second, while there was some evidence in *National Car Rental*, *Cooper Thermometer* and *Fraser & Johnston* that at least some of the terminated employees were interested in transferring to the relocated facility, neither the Board nor the Fifth Circuit in the instant case pointed to *any* evidence that *any* of the six discharged East Point employees would have transferred to bargaining unit positions in the College Park facility absent the unlawful refusal to consider them for transfer.

Finally, while the decisions of the Second, Third and Ninth Circuits involved simple relocations with a continuation of

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and Ninth Circuits would not permit the NLRB to speculate as to what might have happened had there been no violation of the Act. Thus, inasmuch as AEI was similarly under no legal obligation to transfer East Point employees to College Park, the court below erred in finding that there was more reason to presume that, absent the unfair labor practice, the East Point employees would have transferred to College Park.

operations at the new facility, the AEI relocation was much more complex. The relocation to College Park was accomplished in conjunction with the acquisition of the assets of another company. There was also a reorganization of AEI's corporate structure which resulted in the creation of a new Southeast Region. Finally, there was a change in the nature of the operations brought about by the consolidation of AEI and Trans-Air and the shift in the emphasis in AEI's operations from international air freight forwarding to domestic air freight forwarding. The Fifth Circuit specifically noted that where a relocation is coupled with a merger, thus producing somewhat altered operations and structure, the Board's inquiry should be more complex than simply ascertaining whether a majority of the bargaining unit at the new facility were represented by the union at the former facility. The employee composition at the new facility, while determinative of whether there has been a continuation of the bargaining unit in a simple relocation, becomes one of a number of factors to be considered when there is a relocation plus other changes in the employer's operations. (Appendix A-12 n.11). It follows that in a relocation coupled with an acquisition of another company and a change in operations, as is the case with AEI, the existence of substantial evidence that the bargaining unit in the new facility is comprised of a majority of union employees from the former facility may not, by itself, be sufficient to warrant recognition of the union at the new facility. As discussed above, the Board and the Fifth Circuit were not even able to point to any evidence that the East Point employees would transfer to College Park in numbers sufficient to comprise a majority of the College Park bargaining unit.

Although the decisions of the circuit courts in *National Car Rental*, *Cooper Thermometer* and *Fraser & Johnston* refused to enforce the Board's bargaining order when it was based on a *presumption* as to the majority status of the union in the new facility, they do adequately protect the bargaining rights of the terminated employees. Thus, the decisions do not preclude the possibility that an order to recognize the union at the new facility may become the appropriate action by the NLRB once

there is affirmative evidence that the union represents a majority of the bargaining unit at the new facility.[11] The problem recognized by the Second, Third and Ninth Circuits, but patently ignored by the Fifth Circuit in the instant case, is that a premature bargaining order, made before the employee composition of the relocated facility is ascertainable, could impose a collective bargaining representative on a bargaining unit in contravention of the majority's section 7 right to choose their own bargaining representative or to refrain from collective bargaining.

The NLRB Has Abused Its Discretion In Not Considering The Section 7 Rights Of The College Park Employees.

While the NLRB has wide discretion in the fashioning of remedies for unfair labor practices, this Court has held that enforcement will be denied of those Board orders which do not effectuate the policies of the Act. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *See also, Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) (wherein this Court held that appellate courts, in reviewing remedial orders of the Board, are not to be relegated to act as passive conduits of arbitrary Board orders).

The NLRB's bargaining order in this case not only fails to effectuate any discernible policy of the National Labor Relations Act, it has the adverse effect of infringing upon the section 7 rights of the College Park employees to select a collective bargaining representative of their own choosing or to refrain from collective bargaining.

The right of employees to choose a collective bargaining representative or to refrain from doing so is the cornerstone of the National Labor Relations Act. *Fraser & Johnston Company v. NLRB*, 469 F.2d 1259, at 1265 (9th Cir. 1972); *Local 57, International Ladies' Garment Workers' Union v. NLRB*,

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11 See *NLRB v. National Car Rental Systems, Inc.*, 672 F.2d at 1190; *Fraser & Johnston v. NLRB*, 469 F.2d at 1265; *Cooper Thermometer Company v. NLRB*, 376 F.2d at 690.

374 F.2d 295, 301 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967), *cert. denied*, 395 U.S. 980 (1969). In *Peoples Gas Systems, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980), the D.C. Circuit Court of Appeals denied enforcement of an NLRB bargaining order holding that the Board abused its discretion where it failed to afford proper weight to the employees' section 7 rights. The D.C. Circuit stated:

> One of the fundamental rights under the Act which the Board is charged with protecting is employees' right to choose their bargaining representative, as well as the 'right to refrain' from collective bargaining. (Footnote deleted.) Those rights are unjustifiably compromised by the remedy chosen here. (Footnote deleted.)[12]
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> • • •
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> A remedial order should recognize the competing considerations which are potentially affected by the remedy chosen, be grounded in factual determinations rather than speculation, and explain how, in light of present circumstances (footnote deleted) its remedy can be expected to effectuate the purposes of the Act. 629 F.2d at 45.

The remedial order at issue here fails to adhere to all three admonitions set forth in *Peoples Gas Systems*. First, the Board order, and the Fifth Circuit's decision, made no effort to balance the efficacy of a bargaining order with the infringement of the section 7 rights of College Park employees which could result from such an order. Second, the Board's reliance

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12 As the D.C. Circuit noted in *Peoples Gas Systems*, the imposition of a bargaining order would infringe on the exercise of the employees' right to choose a representative for many years hence. Subsequent to the issuance of a bargaining order, there is a "reasonable period," similar to the year after a union is certified, during which no decertification petition will be considered. *See*, e.g., *Mercy-Memorial Hospital Corp.*, 221 N.L.R.B. 1 (1975); *Hermet, Inc.*, 207 N.L.R.B. 671 (1973). Thereafter, if a contract is signed within the year, the contract-bar rule would ordinarily stymie any attempt by the employees to choose another union or decertify the incumbent union. 629 F.2d at 45 n.17.

on a *presumption* that the six discharged East Point employees would have transferred to College Park, absent the unfair labor practices, is inherently speculative and is clearly not grounded in factual determinations. Finally, neither the NLRB nor the Fifth Circuit articulated what, if any, policy of the Act would be effectuated by imposing Local 728 as the representative of the College Park employees. Thus, the bargaining order issued by the NLRB in the present case, as in *Peoples Gas Systems*, amounts to an abuse of the Board's discretion.

This Court has held that the function of a Board order is the restoration of the *status quo* to the greatest extent practicable. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). The primary purpose of restoring the *status quo* is to redress any injury caused employees as a result of the employer's unfair labor practice. *Local 57, International Ladies' Garment Workers' Union v. NLRB*, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967), *cert. denied*, 395 U.S. 980 (1969). Thus, the Board's powers are remedial, not punitive. *Bell & Howell Co. v. NLRB*, 598 F.2d 136 (D.C. Cir.), *cert. denied*, 442 U.S. 942 (1979); *Local 57, International Ladies' Garment Workers' Union v. NLRB*, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967), *cert. denied*, 395 U.S. 980 (1969). Inasmuch as the Board's bargaining order seeks to redress a speculative and hypothetical injury to the terminated East Point employees while having the absolutely certain consequence of stifling the section 7 rights of the unrepresented employees at College Park by imposing a bargaining representative on them without reference to their choice, the Board's order can only be deemed as punitive.

As the circuit courts found in *National Car Rental*, *Cooper Thermometer* and *Fraser & Johnston*, the section 7 rights of the discharged East Point employees to be represented by Local 728 at College Park can be adequately protected without the imposition of the ill-considered and extraordinary remedy ordered by the NLRB and enforced by the Fifth Circuit in the case before this Court. Thus, the NLRB is empowered to order a remedial election at the new facility.

The issue of the Board's authority to order bargaining in cases involving relocation and merged facilities is important to the administration of the National Labor Relations Act. This issue has reached the courts of appeals in several cases, and it recurs frequently before the Board. Inasmuch as this case presents a clear opportunity for this Court to strike the proper balance between the section 7 rights of employees and the Board's authority to remedy unfair labor practices, which has been precariously skewed away from the former, review by this Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT*
UNIT B

No. 79-3776

Oct. 19, 1981.

AIR EXPRESS INTERNATIONAL CORPORATION,

Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

Employer sought to set aside National Labor Relations Board order entered against it and the Board sought enforcement. The Court of Appeals, Godbold, Chief Judge, held that: (1) substantial evidence supported finding that certain employees were discharged in violation of the National Labor Relations Act; (2) Board's bargaining order was enforced on basis that union had not enjoyed its full year of certification; and (3) substantial evidence supported findings of Board that employer was in violation of the Act for failing to bargain in good faith over the effects of relocation of a plant.

Enforced in part, vacated in part, and remanded in part with directions.

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

On Petition for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board.

Before

GODBOLD, *Chief Judge*,
MORGAN and HENDERSON, *Circuit Judges*.

GODBOLD, *Chief Judge*:

Air Express International ("AEI") seeks to set aside the Board's order entered against it, and the Board seeks enforcement.

AEI is engaged in the business of air freight forwarding. Until February 9, 1978 its plant serving Atlanta's airport was located in East Point, Georgia. February 10, 1978 AEI acquired nationwide all of Trans-Air Freight System, Inc.'s ("Trans-Air") air freight forwarding business and moved its own Atlanta operation to Trans-Air's Atlanta facility located seven to 10 miles away in contiguous College Park, Georgia, consolidating the two Atlanta operations.

Just two months prior to this move Truckdrivers and Helpers Local Union No. 728 ("the Union") was certified as the collective bargaining representative for the nonsales personnel at AEI's East Point facility.[1] Trans-Air's College Park facility was not unionized.

This controversy centers on AEI's decision to transfer only three of its East Point nonsales personnel to the new College Park facility, thereby discharging five members of the East Point bargaining unit, and AEI's refusal to recognize the Union as the representative of the College Park employees. Also at issue is the discharge of a sixth East Point employee

1 The election was held July 28, 1977, with a 5-1 vote for the Union. The Board certified the Union on December 14, 1977. Guards, supervisors, and confidential and professional (i.e., sales) employees were excluded from the bargaining unit.

prior to the move, the alleged failure of AEI to bargain in good faith with the Union over the effects of the move, and AEI's alleged acts of interrogation, threats of reprisal, promises of benefit, solicitation of employees not to engage in union activity or to give testimony to the Board, and creation of the impression of surveillance. An administrative law judge ("ALJ") found against AEI on virtually all charges and recommended that AEI be ordered to cease and desist from the various violations of §§ 8(a)(1), (3), and (5), 29 U.S.C. § 158(a)(1), (3) and (5), that he had found, to offer reinstatement and back pay to the six discharged East Point employees, and to post the usual notice. The Board affirmed the ALJ's findings in all particulars except one,[2] adopted the recommended order (with minor variations), and rejected AEI's contention that it had been prejudiced by any bias of the ALJ.

I.

We focus first on the discharged employees. AEI contends that the five East Point employees who were not transferred to the new College Park facility were terminated[3] because it was

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2 The Board ruled that Trans-Air's station manager at College Park was not acting for AEI when he made threats of reprisal prior to consummation of AEI's acquisition of Trans-Air. We agree with this ruling. As the Board discerned, the ALJ's conclusion to the contrary was based solely on speculation.

3 Some controversy surrounds whether John Moore, one of these five, was in fact terminated. Moore was offered a position at the new plant but only as a supervisor. Moore had previously turned down a supervisor's position at East Point because it lacked the security of tenure that his rank-and-file position possessed. He again refused a supervisor's positon at College Park, and thus was terminated for a time, although he did recant and agree one month later to come back on as a supervisor. The fact that Moore was offered another position does not ameliorate AEI's discriminatory refusal to retain Moore at his current position because Moore considered the new position less desirable and because the Board found upon substantial evidence that AEI, in offering Moore only a supervisor's position, was motivated by a desire to lessen the number of rank-and-file union supporters at College Park.

decided as a business matter that the company needed to break up one of the employee groups and the employees of the less profitable operation should be let go with the hope that Trans-Air's more profitable customers would be retained.[4] Thus AEI argues that it had no illegal motive, or if there were such a motive that it would have made the same decision regardless. The Board found to the contrary. Its decision is based on substantial evidence. First, there is direct testimony by a former AEI sales employee that Frank O'Rorke, AEI's district manager stationed at East Point, told her over a series of conversations that the company was not going to allow the union in Atlanta, that it was going to get rid of the employees who voted for the union, and that "those guys . . . cut their throats" by bringing in the union. Second, circumstances speak as loudly as these words. Of the three East Point employees retained after the move one was the station manager, one was a vocal anti-union advocate, and the third was the replacement for Nella Ree Dunn, the employee who had been discharged prior to the move. By contrast, the five employees not transferred included all of the acknowledged union organizers and supporters at the East Point facility. Elsewhere in the country when AEI consolidated its operations with Trans-Air's not a single AEI employee was discharged except for two part-time workers. We have no difficulty in holding that the Board correctly found that these terminations violated § 8(a)(3) of the Act and in enforcing the orders of reinstatement and back pay.

We also enforce the Board's decision as it relates to Nella Ree Dunn. Dunn was secretary to district manager Frank O'Rorke. She was fired July 11, 1977, two and one-half weeks before the election, because O'Rorke suspected her of being the source of leaks of salary information that were causing

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4 AEI's contention that it was motivated by the East Point employees' refusal 10 months earlier to comply with changes in their shifts patently lacks merit. Only one employee actually refused a shift change, and only one other was opposed to the changes. Moreover, at the time of opposition to the changes no employee was disciplined or reprimanded in any way except for the station manager who was fired for giving in to the one workers' protest.

dissension among the employees. Later, O'Rorke asserted as additional grounds for Dunn's dismissal her incompetence and that business was slow. The Board found these reasons to be disingenuous. There was no direct evidence that Dunn was responsible for the leaks, they took place well before Dunn's discharge, and salary information was commonly known and was not as a general rule kept in confidence. The later asserted grounds were found to be pretextual. Thus, the Board concluded that the real reason for Dunn's discharge was that O'Rorke suspected her of supporting the union. The evidence is substantial.

In its reply brief AEI raises for the first time the argument that Dunn is not protected by the Act because she is a confidential secretary. Without deciding the validity of this legal contention,[5] we hold that the ALJ correctly found Dunn not to be a confidential secretary. O'Rorke testified that June 8, the day he received the Union's election petition, all confidential duties that Dunn might have had were withdrawn from her. Thus, at the time of her discharge one month later Dunn's position was admittedly non-confidential.

II.

AEI hotly contests the order directing it to bargain with the Union at its Colloge Park facility. The Board based this order on two alternative grounds: first, that the certification obtained December 14, 1977 at the East Point facility covered the College Park employees once AEI transferred its operations there February 10, 1978; second, that a *Gissel*[6] order was warranted because of the severity of AEI's illegal opposition to the Union.

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5 The U.S. Supreme Court has granted certiorari in a case that presents this issue. *Hendricks County Rural Electric Membership Corp. v. NLRB*, 627 F.2d 766, 771-76 (7th Cir. 1980), *cert. granted*, ____ U.S. ____, 101 S.Ct. 1479, 67 L.Ed.2d 612 (1981) (No. 80-1103).

6 *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969).

A *Gissel* bargaining order is typically invoked when a union that has only informal evidence of majority status is refused recognition; the order issues because a formal election either fails or is likely to fail because of the company's commission of unfair labor practices. Bargaining orders are also appropriate where recognition is withdrawn from a union that has been formally certified as the representative of a bargaining unit. *See Peoples Gas System, Inc. v. NLRB,* 629 F.2d 35, 46-48 (D.C.Cir.1980) (discussing the distinction). Certification carries with it an entitlement to one year's presumptive majority status, a presumption irrebuttable absent "unusual circumstances." *Brooks v. NLRB,* 348 U.S. 96, 75 S.Ct. 176, 99 L.Ed. 125 (1954); *NLRB v. Auto Ventshade, Inc.,* 276 F.2d 303 (5th Cir. 1960). If an employer fails to honor properly a union's certification, then a non-*Gissel* bargaining order may issue to enforce the certification. *See e. g., NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272, 278-81, 92 S.Ct. 1571, 1577-79, 32 L.Ed.2d 61 (1972); *NLRB v. Louisiana Bunkers, Inc.* 409 F.2d 1295 (5th Cir. 1969). If the East Point certification extends to the College Park facility, then this is a withdrawal of recognition (non-*Gissel*) case. If not, then College Park is uncertified and we have a refusal of recognition (*Gissel*) case.

A union certification applies to the intangible construct known in labor parlance as a "bargaining unit" (or simply "unit"). A unit enjoys the ephemeral attributes of not being rigidly defined by any fixed location, size, or composition of personnel. Thus, the relocation of a unit, an increase or decrease in the size of a unit, or a complete turnover within a unit alone does not require a finding that a once-certified unit has ceased to exist. *See Louisiana Bunkers, Inc.,* 409 F.2d at 1298-99 (relocation); *NLRB v. King Radio Corp.,* 510 F.2d 1154, 1156-57 (10th Cir.), *cert. denied,* 423 U.S. 839, 96 S.Ct. 68,46 L.Ed.2d 58 (1975) (increase); *NLRB v. Middleboro Fire Apparatus, Inc.,* 590 F.2d 4, 8 (1st Cir. 1978) (decrease); *NLRB v. Leatherwood Drilling Co.,* 513 F.2d 270, 273 (5th Cir. 1970), *cert. denied,* 423 U.S. 1016, 96 S.Ct. 449, 46 L.Ed.2d 387 (1975) (turnover). But as with other metaphysical categories,

these mutations by degree, if severe enough, shade into mutations by kind, and may result in eradication of a unit. In such cases, where changes in the characteristics of a unit result in its being classified as either a different unit or a nonunit, "unusual circumstances" have occurred so that a company is justified in withdrawing recognition from a union during the first year of certification. *See Brooks v. NLRB*, 348 U.S. at 98-99, 75 S.Ct. at 178 (unusual circumstances include radical fluctuation of unit size in a short time). The courts give a wide degree of discretion to the Board in its determinations of the composition and definition of units. *E. g., Vicksburg Hospital, Inc. v. NLRB*, 653 F.2d 1070 at 1074-75 (5th Cir. 1981); *NLRB v. Foodway*, 496 F.2d 117, 119 (5th Cir. 1974) (arbitrary and capricious standard); *NLRB v. Baton Rouge Water Works*, 417 F.2d 1065 (5th Cir. 1969) (same).

With these principles in mind, we examine the facts to determine whether the College Park unit is a continuation of the East Point unit. AEI first contends that certification does not extend to College Park because a single-plant unit is no longer appropriate as a result of AEI's reorganization of its southeastern district. The Atlanta facility once comprised a single-plant district, but upon acquisition of Trans-Air AEI's southeastern district was restructured to include Atlanta and Charlotte. AEI contends that the Board may now only aggregate the employees at the Atlanta and Charlotte facilities into one unit rather than maintaining two separate units because labor management policy is formed only at this expanded district level. We do not agree. Restructuring AEI's regions is not the kind of change that amounts to an "unusual circumstance." To hold otherwise would allow any company to avoid a certification simply by shifting its management.

AEI next contends that as the result of the relocation of its East Point facility and its consolidation with the former Trans-Air facility, the College Park plant is a "new operation" and therefore not within the East Point certification. AEI argues that because 85% of its East Point business was international air freight whereas 85% of Trans-Air's business was domestic, upon merger of the two a new amalgam was formed.

The company also points to the fact that the new facility is seven to 10 miles away on the opposite side of the airport and that its staff has doubled. Other facts support the Board's conclusion. AEI at its College Park facility continues to service only the Atlanta airport, it remains only in the air freight forwarding business, and but for its discriminatory termination of six employees a substantial percentage of its College Park employee complement would consist of former East Point workers.

The authorities cited by AEI are sufficiently distinguishable on their facts that the Board is not being arbitrary or illogical in declining to follow them here. In *General Electric Co.*, 170 NLRB 1272 (1968), the Board found that the consolidation of two plants created a new operation under facts similar to those here: the new plant was 10 miles away and the product lines of the two old plants were similar. The critical factor, though, and the one that the Board focused on, was that only half of the employees in question at the old plant that was unionized transferred to the new facility. Similarly, in *Electronic Products International Corp.*, 208 NLRB 350 (1974), the Board found that a relocated plant was a separate unit, but only two of the seven employees at the old plant accepted transfers, and they both quit within 30 days of the move. By contrast, here, as discussed below in this section of the opinion, it is presumed that all of the employees in the East Point bargaining unit would transfer.

Bearing in mind the deference we give to the Board in the question of the composition of a bargaining unit, we hold that the Board did not err in its unit determination in this matter. *NLRB v. Baton Rouge Water Works*, 417 F.2d 1065 (5th Cir. 1969) is analogous. There the Board held that a small rural water company acquired by Baton Rouge Water Works was an "accretion" to the Baton Rouge bargaining unit and thus was covered by union certification at Baton Rouge. We enforced the bargaining order even though the second facility was nine miles away, serviced rural customers rather than urban, had a separate day-to-day management, and was a separate legal entity. *See also NLRB v. Foodway*, 496 F.2d 117 (5th Cir. 1974)

(acquiring company succeeds to duty to recognize existing union despite 24 distinguishing factors): *Vernon Calhoun Packing Co., Inc.*, 173 NLRB No. 112 (1968), *enforced without opinion*, 436 F.2d 588 (5th Cir. 1971) (second plant is an accretion).

So far we have pretermitted the issue of whether former East Point employees comprise a majority of the College Park bargaining unit. Employee composition at the new facility is usually the most critical factor in characterizing a relocated or merged unit. The Board found after lengthy analysis that the bargaining unit at College Park consisted of 10 employees, and that if AEI had not discriminatorily discharged six of its East Point employees, then seven[7] of these 10 would be former members of the East Point bargaining unit. AEI counters that no majority exists because three College Park employees found to be supervisors are actually rank-and-file and there is no evidence that the six employees not transferred would in fact have moved if given the opportunity.

The Board's initial characterization of three of Trans-Air's former employees as supervisors was based on substantial evidence. There is testimony that two of these three had authority to hire or fire employees and all three exercised independent judgment in directing other workers. Each was in charge of the facility during his or her shift. This satisfies the Act's definition of supervisor. *See NLRB v. Alamo Express, Inc.*, 430 F.2d 1032 (5th Cir. 1970), *cert. denied*, 400 U.S. 1021, 91 S.Ct. 584, 27 L.Ed.2d 633 (1971). The Board erred, however, in confining its inquiry to what the duties of these three were on the day of the move. Shortly after the move one of these three, Susan Doyle, was reclassified to "lead agent," allegedly because it was felt that there were too many supervisors.[8] In assessing the effects of a relocation or merger of a

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7 The seventh is Kathy Lee, the anti-union employee who was transferred.

8 In addition to these three contested supervisors there were three other employees with the title of supervisor.

bargaining unit, a reasonable "shake down" period may be required in order for the new unit to stabilize. *Cf. NLRB v. Houston Distribution Services, Inc.*, 573 F.2d 260, 266 & n.7 (5th Cir. 1978), *cert. denied*, 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 705 (1979) (accord where issue is successorship of acquiring company). The Board failed to allow for the possibility that Doyle's reclassification was part of such stabilization. If Doyle's status were critical to our decision, we should remand for further consideration. Our assessment of the composition of the bargaining unit does not change according to her status, however, and so we simply vacate the Board's decision as to Doyle and assume *arguendo* that she is not a supervisor.

We are left then with a bargaining unit of 11, composed of a majority of seven former East Point employees. AEI argues though that there is no evidence that the six discharged employees would have accepted a transfer to College Park if they had been given such an opportunity, citing *Fraser & Johnston Co. v. NLRB*, 469 F.2d 1259, 1264 (9th Cir. 1972) and *Cooper Thermometer Co. v. NLRB*, 376 F.2d 684, 689 (2d Cir. 1967). In the circumstances of this case, however, the Board is not required to affirmatively demonstrate that each discharged employee would have transferred absent his or her illegal termination. The Board may rely on the presumption that discriminatorily discharged employees remain on with the company. *See NLRB v. Fabsteel Co.*, 587 F.2d 689, 695 (5th Cir.), *cert. denied*, 442 U.S. 943, 99 S.Ct. 2887, 61 L.Ed.2d 313 (1979); *NLRB v. Houston Distribution Services, Inc.*, 573 F.2d 260, 267 (5th Cir. 1978), *cert. denied*, 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 705 (1979). The policy that gives rise to this presumption of continued employment is that a violator of the Act should not be allowed to benefit from its wrongdoing by placing the difficult burden on the Board of proving how individual employees might have acted under hypothetical circumstances. *NLRB v. A. W. Thompson, Inc.*, 449 F.2d 1333, 1337 (5th Cir. 1971), *cert. denied*, 405 U.S. 1065, 92 S.Ct. 1497, 31 L.Ed.2d 795 (1972).

The critical factor that distinguishes this case from those cited by AEI is that here the failure to transfer the employees in question was itself a violation of the Act. For example, in both *Cooper Thermometer v. NLRB*, 376 F.2d 684 (2d Cir. 1967) and *Fraser v. Johnston*, 469 F.2d 1259 (9th Cir. 1972), the courts refused bargaining orders because there had been no affirmative showing that a majority of employees at a relocated plant came from the old unionized plant, even though the relocation was accompanied by unfair labor practices. In both cases, however, the labor violations did not involve unlawful terminations but merely failure to bargain over the effects of the relocation. Without adopting the reasoning of these cases, we note that there is much less reason in such cases to presume that employees who did not transfer would have done so absent the particular violations.[9]

Relying on this presumption, we find there is substantial evidence to support the finding that the six discharged employees would have transferred to College Park absent their discharge, particularly since AEI has failed to develop any evidence to the contrary.[10] We hold, then, that the Board's

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9 We note also that the presumption might not arise where a plant is relocated to an entirely different metropolitan area. For example, in *Local 57, International Ladies' Garment Workers v. NLRB*, 374 F.2d 295 (D.C.Cir.1967), *cert. denied*, 395 U.S. 980, 89 S.Ct. 2129, 23 L.Ed.2d 767 (1969), the court held that a bargaining order would not issue where a plant was moved to Miami from New York but the court observed that this remedy has been used "where the move was of such a short distance that the Board could assume that, absent the unfair labor practices, workers would have followed the employer to the new site." *Id.* at 303.

10 In a *Gissel* order case majority status is to be determined at the time the order issues. *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir.), *cert. denied*, 400 U.S. 957, 91 S.Ct. 356, 27 L.Ed.2d 266 (1970). In this non-*Gissel* case, however, the composition of the bargaining unit is to be determined at the time of the relocation (or after a reasonable shake down period). Otherwise, the rule would be contrary to principles of fair play, *see NLRB v.* Auto Ventshade, Inc., 276 F.2d 303, 307 (5th Cir. 1960), and would create an undesirable incentive to delay through litigation. The difference exists between the two rules because in a *Gissel* case the issue is whether an extraordinary remedy is warranted while in this non-*Gissel* case the issue is simply whether the certification is to be given continued effect.

determination of the size and composition of the College Park bargaining unit, although possibly flawed in one respect, is correct so far as is necessary for us to affirm the finding of continuation.

To summarize our reasoning with regard to the Board's bargaining order, in this case a certified bargaining unit has been merged *and* relocated and employees have been discriminatorily discharged in the process. Because the move was over a relatively short distance the Board could presume that the discharged employees would have transferred but for their termination, and that presumption has not been rebutted. We thus view the College Park bargaining unit as being composed of a majority of workers from the East Point plant, and this fact along with others adequately supports the Board's conclusion that College Park is a continuation of East Point.[11] Because the Union has not enjoyed its full year of certification, we enforce the Board's bargaining order (as modified below). We need not address whether a *Gissel* order would be appropriate in this case.

III.

We come now to the findings of the Board that AEI was in violation of the § 8(a)(5) for failing to bargain in good faith over the effects of the relocation.

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11 We note that a majority of former workers at a new facility is not necessary to find a continuation of a bargaining unit after merger and relocation if other factors strongly support this conclusion, *see Westwood Import Co.*, 251 NLRB No. 162 (1980) (the Board's practice in relocation cases accompanied by unfair labor practices has been that if "a majority or *some significant portion* of the unit employees at the new location" would have been from the old location but for such practices, then a bargaining order has issued) (emphasis added), nor would a majority be sufficient if these other factors were lacking, for instance if the business of the new plant were entirely different from that of the former. In each situation the issue remains whether in the light of all the facts the bargaining unit remains the "same" or is now a "different" one. We note also that whereas in simple relocation cases the Board has treated the employee composition factor as the determinative one, see *Westwood*, where a relocation is coupled with a merger and thus somewhat altered operations and structure, as here, the inquiry is more complex.

The union and AEI met on three occasions to discuss the effects of the move. The Board found upon substantial evidence that at these meetings AEI improperly refused to supply the union a copy of its acquisition agreement with Trans-Air, that AEI's list of Trans-Air personnel given to the union was somewhat incomplete and inaccurate, and that AEI misrepresented its position by stating that it intended to terminate all East Point employees when in fact it intended to transfer Kathy Lee. We hold that these findings support the Board's order insofar as AEI is required to furnish to the union complete employee information and a copy of the acquisition agreement and is required to bargain in good faith in the future. The Board erred, however, in using the date of AEI's first failure to bargain in complete good faith (January 4, 1978) as the measure of the date to which its bargaining order was to be retroactive. The violations of § 8(a)(5) outlined above do not amount to a withdrawal of recognition. It was not until February 11, 1978, one day after the move, that AEI refused to recognize the Union as the representative of its College Park plant. This date should measure the bargaining order because the union enjoyed effective recognition from December 14 when it was certified until February 11. We therefore vacate the Board's bargaining order and remand with directions to modify the order so as to allow the union to enjoy certified representative status only for the remainder of its certified year.[12]

IV.

We enforce the Board's order as relevant to the remainder of miscellaneous violations of the Act. Based on substantial evidence, the Board found that AEI discriminatorily threatened to withhold raises from some employees while granting and promising raises to others all in order to discourage union activity and weaken the pro-union majority, that AEI threat-

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12 Thereafter, of course, the certification will remain in effect but subject to rebuttal or good faith doubt.

ened employees with various other reprisals because of their support of the union, and that AEI created the impression of surveillance and otherwise interfered with the freedom of employee's union activities by interrogating employees about such activities, by warning of "harassment" from Board agents, and by soliciting employees not to testify before the Board.

Finally, we agree with the Board that there is not evidence of bias sufficient to reject the ALJ's findings.

ENFORCED in part, VACATED in part, and REMANDED in part with directions to modify.

APPENDIX B

Opinion of the United States Court of Appeals for the Fifth Circuit on Reconsideration and on Cross-Motions for Entry of Judgment

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT*
UNIT B

No. 79-3776

March 15, 1982.

AIR EXPRESS INTERNATIONAL CORPORATION,

Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

On Reconsideration and on Cross-Motions for Entry of Judgment

Before

GODBOLD, *Chief Judge,*
MORGAN and HENDERSON, *Circuit Judges.*

BY THE COURT:

The court has reconsidered the mandate in its opinion 659 F.2d 610, in the light of cross-motions for entry of judgment. It concludes that it is not necessary to vacate the National Labor

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

Relations Board's order and to remand the case. Instead, it is sufficient that the order of the Board be ENFORCED but in conformity with the opinion of this court. The last paragraph of our opinion, containing the mandate, is deleted and the following substituted in lieu thereof:

ENFORCED but in conformity with the foregoing opinion of this court.

APPENDIX C

Decision and Order of the NLRB and Opinion of the Administrative Law Judge

FPT

245 NLRB No. 69

D—5638
East Point and
College Park, GA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 10—CA—12941 and 10—CA—13436

AIR EXPRESS INTERNATIONAL CORPORATION

and

TRUCKDRIVERS AND HELPERS LOCAL UNION NO. 728

DECISION AND ORDER

On March 23, 1979, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and Respondent then filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions[3] of the Ad-

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1 The parties have filed a number of procedural and evidentiary exceptions to rulings the Administrative Law Judge made during the hearing. We find no merit to these exceptions, save for the Administrative Law Judge's exclusion of an allegedly stolen document offered by the General Counsel. It is well established, as stated by the General Counsel, that Board practice is to admit such documents unless it is proven that a Board agent "has been a party to their unlawful seizure." *Airline Pilots Association*, 97 NLRB 929 (1951); *H & G Operating Corp. d/b/a Raleigh Hotel*, 191 NLRB 719, 728 (1971). There was no such showing herein. We therefore find that the Administrative Law Judge erred in rejecting the document in question, but that, in view of the ultimate conclusions herein, this ruling did not result in prejudice to the General Counsel.

2 In its brief, Respondent cites the recent Supreme Court decision in *Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301, 100 LRRM 2728 (1979), as being analogous to the situation in the instant case, and requiring a reversal of the Administrative Law Judge's finding that Respondent violated the Act by refusing to supply the Union with a copy of the acquisition agreement between the Company and Trans-Air Freight System, Inc. (hereinafter Trans-Air). In *Detroit Edison*, the Supreme Court vacated the Sixth Circuit Court of Appeals' enforcement order of the Board's holding that the employer was required to release to the union representing its employees the psychological test battery and answer sheets it utilized to determine job aptitude, as well as employee-linked scores on these tests, and remanded the case to the lower court for further proceedings consistent with its opinion. The employer in *Detroit Edison* had offered to turn over the test score information to the union if the employees involved would sign a waiver of confidentiality. The Court held that, by making this conditional offer, the company fulfilled its statutory obligation to bargain in good faith, in view of the "sensitive nature of testing information, the minimal burden that compliance with the Company's offer would have placed on the Union, and the total absence of evidence that the Company had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities . . . ." (100 LRRM at 2735.)

Respondent argues that, based on the principles set out in *Detroit Edison*, the press releases and the CAB order allowing the acquisition supplied to the Union satisfied Respondent's duty to provide relevant information for the purposes of bargaining concerning the acquisition. Respondent's claim is grounded on the confidential nature of the actual acquisiton document, and the Company's interest in preserving that confidentiality which is allegedly

similar to the concerns of the company in *Detroit Edison* regarding the employee-linked test scores. We do not agree that the situations in *Detroit Edison* and the instant case are analogous. Contrary to what occurred in *Detroit Edison*, in the instant case the public documents offered by Respondent to the Union, dealing with the acquisition, did not provide the Union with the necessary information to intelligently discuss the pending transfer, and therefore, unlike the conditional offer in *Detroit Edison*, no adequate alternative means of granting the Union's request for information was offered by Respondent. Further, Respondent raises the issue of the confidentiality of the agreement for the first time in its exceptions, therefore suggesting that there is some question herein as to the validity of Respondent's concern over the confidentiality of the document. Accordingly, we find that the Supreme Court's holding in *Detroit Edison* does not require a different result herein.

The General Counsel has excepted to the Administrative Law Judge's recommended remedy insofar as it recommends that interest on backpay be computed at a rate other than the 9 percent requested by the General Counsel. We find no merit in that exception. See *Florida Steel Corporation*, 231 NLRB 651 (1977).

Finally, Respondent has alleged that the Administrative Law Judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. While we disavow any reliance on certain gratuitous remarks made by the Administrative Law Judge in characterizing several of the witnesses who testified herein in adopting his ultimate recommendations in the instant case, after careful examination of the entire record we are satisfied that this allegation of bias is without merit. There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949): "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

3 The Administrative Law Judge concluded that Robert Heney, district manager of Trans-Air's Atlantic facility, was placed by Respondent, during the pre-acquisition period, in a position where he had apparent authority to make statements which violated Sec. 8(a)(1) of the Act. Therefore, the Administrative Law Judge held Heney to be Respondent's agent and thereby found that by Heney's statements Respondent violated Sec.

ministrative Law Judge and to adopt his recommended Order,[4] as modified herein.

8(a)(1) of the Act. In so finding, the Administrative Law Judge relied on the arguments that during this time period Heney had a contractual commitment to become Respondent's Atlanta district manager, which fact he made known to his Trans-Air employees; and further that in that posture he answered employee questions concerning the pending acquisition. The Administrative Law Judge also speculated that, during his contacts with Respondent prior to the acquisition, Heney was indoctrinated with the antiunion company policy and was urged to aid in its implementation. Respondent has excepted to this conclusion and we find merit in its exception.

Contrary to the Administrative Law Judge, we find no evidence in the record to support the holding that Heney was authorized by the Company to act as its spokesman at the Trans-Air facility, or that the Trans-Air employees reasonably believed that such a relationship existed between Heney and Respondent. It is apparent that the Administrative Law Judge's conclusions in this area are based solely on speculation. Further, while it is true that Heney, among other Trans-Air employees had signed an employment contract with Trans-Air which was to be assigned to Respondent upon the successful completion of the acquisition, this contract cannot be relied upon to establish an agency relationship. For, at least one Trans-Air manager who signed such a contract was released from this commitment and did not remain with Respondent after the acquisition. Based on the above discussion, we find, in accord with Respondent's contentions, that Heney was not an agent of Respondent during the pre-acquisition period. Accordingly, contrary to the Administrative Law Judge, we find Respondent did not violate Sec. 8(a)(1) of the Act by Heney's statements.

Member Truesdale would exclude Carl Herrington from the unit in accord with his dissent in *Tops Club, Inc.*, 238 NLRB No. 130 (1978).

4 In view of the serious unfair labor practices committed by Respondent, the Administrative Law Judge, in his recommended Order and notice, included a broad order provision as a remedy under the doctrine set out in *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941), enfg. 23 NLRB 1058 (1940). In our opinion, the egregious misconduct engaged in herein by Respondent, as evidenced by its attempt to exclude the Union from its Atlanta facility by terminating almost all of the unit employees clearly "demonstrate[s] a general disregard for [its] employees' fundamental statutory right." *Hickmott Foods, Inc.*, 242 NLRB No. 177, sl. op. at p.2 (1979). Accordingly, we find in agreement with the Administrative Law Judge that a broad order is warranted in this case.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below,[5] and hereby orders that the Respondent, Air Express International Corporation, East Point and College Park, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) Threatening employees with discharge, loss of jobs, loss of pay raises, closure of the Company's facility, or other reprisal because of union activity; threatening employees with no additional hiring because of union claims of representation; and warning employees not to engage in union activity."

2. Substitute the following for paragraph 2(a):

"(a) Offer Nella Ree Dunn, Lynn Ashmore, John Moore, Marlin Rozier, John Shepherd, and James McCollum immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their senority or any other rights or privileges previously enjoyed, and make them whole for losses they suffered by reason of the discrimination against them as set forth in the section of this Decision entitled 'The Remedy.' "

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5 We find merit in the General Counsel's exception to the inadvertent failure of the Administrative Law Judge to include one of his findings in his recommended Order and notice. The Board has, therefore, modified the recommended Order and notice accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. September 27, 1979

John H. Fanning, Chairman

John A. Pennello, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all parties had an opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and to carry out its provisions.

WE WILL NOT discourage membership in Truck Drivers and Helpers Local Union No. 728, or any other labor organization, by discriminatorily terminating employees, or in any other manner discriminating against them with regard to their hire of tenure of employment or any term or condition of employment.

WE WILL NOT threaten employees with discharge, loss of jobs, loss of pay raises, closing our facility, or other reprisal because of union activity; WE WILL NOT threaten employees with no additional hiring because of the Union's claim or representation; and WE WILL NOT warn employees not to engage in such activity.

WE WILL NOT promise wage increases in order to induce employees not to support Local 728 or any other labor organization.

WE WILL NOT question employees concerning their union membership, activities, or desires, or as to whether they have been subpenaed to attend a Board hearing.

WE WILL NOT create the impression of spying on employee union activity by telling our employees that we have been informed that employees were talking to Board agents, and WE WILL NOT solicit employees to refuse to give testimony to Board agents.

WE WILL NOT refuse to recognize or bargain collectively in good faith with Local 728 as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All dockmen, drivers and agents employed by us at our College Park, Georgia, facility formerly located in East Point, Georgia, but excluding all sales personnel, confidential employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights to organize; to form, join, or assist labor organizations, including Local 728; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

WE WILL offer Nella Ree Dunn, Lynn Ashmore, John Moore, Marlin Rozier, John Shepherd, and James McCollum immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for losses they suffered by reason of the discrimination against them, plus interest.

WE WILL recognize and, upon request, bargain collectively with Local 728 as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL promptly furnish to Local 728 a true and complete copy of the acquisition agreement between us and Trans-Air Freight System, Inc.

WE WILL promptly furnish to Local 728 a complete and accurate list of the names, job classifications, and dates of hire of all personnel employed at our Atlanta station, or by Trans-Air Freight System, Inc., since January 4, 1978.

AIR EXPRESS INTERNATIONAL CORPORATION
(*Employer*)

Dated _____ By _____
(*Representative*) (*Title*)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Marietta Tower, Suite 2400, 101 Marietta Street, NW., Atlanta, Georgia 30303, Telephone 404-221-2886.

JD-134-79

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case Nos. 10-CA-12941
10-CA-13436

AIR EXPRESS INTERNATIONAL CORPORATION,

Respondent

and

TRUCKDRIVERS AND HELPERS LOCAL UNION NO. 728

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JD-134-79
East Point and
College Park, GA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case Nos. 10-CA-12941
10-CA-13436

AIR EXPRESS INTERNATIONAL CORPORATION,

Respondent

and

TRUCKDRIVERS AND HELPERS LOCAL UNION NO. 728

Charging Party

Paul K. Tamaroff Esq., and
Mary K. McIntire, Esq., of
Atlanta, GA, for the
General Counsel.

Frederick C. McLam, Esq., of
Atlanta, GA, for the
Charging Party.

Jerold D. Jacobson, Esq., of
New York, NY, and *Mr. Daniel M.*
Thompson, of Atlanta, GA,
for the Respondent.

DECISION

Statement of the Case

MARVIN ROTH, Administrative Law Judge: Case No. 12941 was originally tried at Atlanta, Georgia on January 25, 1978. The charge in that case was filed on July 19, 1977, by Truckdrivers and Helpers Local Union No. 728 (herein the "Union"). The complaint, which issued on August 31, 1977, alleged that Air Express International Corporation (herein the "Company" or "Respondent"), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. The gravamen of the complaint was that the Company threatened its employees that all pay raises were frozen and that employees would not get pay raises because of the Union, and discharged employee Nella Ree Dunn on July 11, 1977, because of her union and concerted activities. The Company's answer denied the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. Respondent was represented by its labor relations consultant, Mr. Daniel M. Thompson. Respondent requested and was granted to leave to file a brief, but no briefs were filed by any party.[1]

On February 13 and 14, 1978, respectively, the Union filed a charge and amended charge in Case No. 13436. On April 4, 1978, while Case No. 10-CA-12941 was pending decision by me, General Counsel issued a complaint in Case No. 10-CA-13436, alleging that the Company had violated and was violating Section 8(a)(1),(3),(4) and (5) of the Act. The gravamen of the new complaint, in sum, was that the Company: terminated employees Lynn Ashmore, John Moore, Marlin Rozier, John Shepherd and James McCollum because of their union adher-

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1 Before I opened the hearing in Case No. 10-CA-12941, the Regional Director issued an order severing that case from Case No. 10-CA-13141, in which the parties entered into an informal settlement argument. As will be discussed herein, evidence concerning the subject matter of the alleged unfair labor practices in case No. 10-CA13141 was presented by General Counsel and Respondent in both the original and reopened hearings, and has been considered by me in deciding the merits of the present cases.

ence and union and concerted activities, and because they gave testimony under the Act; violated Section 8(a)(1) by numerous acts of interrogation, threats of reprisal, promises of benefit, solicitation of employees not to engage in union activity or to give testimony to the Board, and creating the impression of surveillance; and unlawfully refused to recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit. General Counsel further filed with me a motion to reopen the record in Case No. 10-CA-12941 and to consolidate Case Nos. 10-CA-12941 and 13436, which motion was opposed by Respondent. On April 21, 1978, I issued a ruling and order granting the motion. I ruled in sum, that consolidation would effectuate the purposes of the Act because the cases involved the same parties and similar alleged unfair labor practices and that it appeared that evidence adduced in either case might well be probative as to the allegations in the other case.[2] After I issued a ruling and order denying a motion by Respondent for a more definite statement, Respondent filed an answer to the complaint in Case No. 10-CA-13436, denying commission of the alleged unfair labor practices. Thereafter the consolidated cases were tried at Atlanta, Georgia on May 31 through June 2, June 26 through 30, August 14 through 18, and September 25 through 27, 1978. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. Respondent was represented by its attorney, Jerold D. Jacobson, Esq. General Counsel presented an oral argument at the close of the hearing, and both General Counsel and Respondent submitted briefs.

Upon the entire record in the consolidated cases[3] and from my observation of the demeanor of the witnesses, and having

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2 During the reopened hearing, I ruled over the objection of General Counsel, that as the record in Case No. 12941 was reopened, the parties could adduce new or additional evidence with respect to the allegations of the complaint in that case. The parties were afforded full opportunity to do so, and in fact, General Counsel and Respondent did present such evidence.

3 The official transcript of proceedings hereby corrected in the following respects:

considered the oral arguments and briefs, I make the following:

Findings of Fact

I. The Business of Respondent

The Company, an Illinois corporation, is engaged throughout the United States and elsewhere in the world in the business of air freight forwarding. The Company functions as an essential link in the transportation of commodities in interstate commerce, and annually receives gross revenues in excess of $50,000 from such operations. I find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Since February 10, 1978 the Company has maintained an office and place of business at College Park, Georgia. Prior to February 10, 1978, the Company maintained an office and place of business at East Point, Georgia. It is these facilities which are involved in the present case.[4]

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

Page	Line	From	To
9	19	Stipulation	Certification
836	2	conversation	question
1086	17-18	cooperation	corroboration
1250	22	there	they
1496	11	Kelsey	Cassi
3009	7	now	not
3210	18	doctorate	doctrine
3212	17	doctorates	doctrines

4 East Point served, and College Park continues to serve the Company's customers through the Atlanta airport, and both are located near the airport. The facilities are sometimes referred to herein as the Atlanta facility.

III. The Alleged Unfair Labor Practices

A. *Events Prior to the Union's Organizational Campaign, and Their Significance to the Case*

In his closing oral argument, counsel for General Counsel asserted that consideration of this case should begin with the arrival of Frank O'Rorke as District Manager at the East Point (Atlanta) facility in March, 1976. In view of certain arguments advanced by company counsel at the hearing, I agree with General Counsel, at least with respect to the discriminatory discharge allegations, that such consideration is warranted.

Prior to his arrival as Atlanta District Manager, O'Rorke held a similar position in Boston, and the Company was pleased with his peformance. However, the Company was not satisfied with its profitability picture in Atlanta. Company President Joseph Berg and Company Vice President Martin Hoffenberg instructed O'Rorke to take charge of the Atlanta facility and to make it profitable.[5]

Hoffenberg and O'Rorke testified that the Atlanta facility suffered from morale problems. However, after taking over in Atlanta, O'Rorke told President Berg that the problem was Regional Manager Resigno, that he was an excessively high pressure salesman. At that time, and until February 10, 1978, the Atlanta district manager reported to the Company's regional office in Pittsburgh, Pennsylvania. However, the Company's labor relations policies were and still are formulated and directed from its principal offices in Stamford, Connecticut.

Resigno was asked to resign, and he was eventually replaced as Regional Manager by Jim Pschirer. In the meantime,

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5 Hoffenberg is and was at all times material, the Company's vice president for administration, secretary and general counsel. Hoffenberg, who is an attorney, is responsible for supervising the Company's legal affairs. He was also responsible for supervising, in all its phases, including staffing and labor relations, the Company's acquisition of the air freight forwarding business of Trans-Air Freight System, Inc. (herein "Trans-Air"). The acquisition, which was completed on February 10, 1978, is a central factor in this case. Hoffenberg was the Company's principal witness at the reopened hearing.

O'Rorke instituted and attempted to institute some changes in the Atlanta operation. O'Rorke hired Kathy Lee to serve principally, although not exclusively, as customer service agent. Customer service work, in sum, involves receiving and answering inquiries by customers concerning their shipments, e.g. inquiries concerning estimated time of arrival or reason for delay in shipment. Prior to Lee's employment, customer service work was not primarily assigned to any particular employee. In early 1977, O'Rorke also tried to institute shift changes, which he felt would make for a more efficient operation. At that time, the personnel complement at the East Point facility, exclusive of sales personnel and owner-operator drivers, consisted of District Manager O'Rorke, his immediate subordinate, Station Manager James Broadaway, Kathy Lee, and the six alleged discriminatees in this case. O'Rorke's plan was not fully carried out and was substantially modified, in part because some employees opposed the plan. However, although the plan would have affected nearly the entire employee complement, the opposition was not uniform. John Shepherd went along with the plan, followed instructions, and accordingly transferred from the day shift to the night shift (11 p.m. to 7 a.m.) instead of Marlin Rozier, as originally planned. O'Rorke admitted that to his knowledge, only Rozier and John Moore opposed the shift changes. Although both expressed vocal opposition to the plan, only Rozier actually refused to change shifts (in his case, from evening to night). Notwithstanding this opposition, O'Rorke saw the problem as one which primarily involved Broadaway. O'Rorke had charged Broadaway with the responsibility of effectuating the plan. O'Rorke felt that instead of asserting leadership, Broadaway simply let the employees have their way. On the basis of O'Rorke's recommendation, Broadaway was terminated in late April, 1977. His replacement as station manager, Mike Floyd, began work on May 27.[6] In the meantime, none of the alleged discriminatees were terminated for insubordination or for any

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6 All dates herein refer to the period from April 1, 1977 through March 31, 1978 unless otherwise indicated.

other reason. On the contrary, John Moore, one of the opponents of O'Rorke's plan, was offered a promotion shortly before Broadaway was terminated. Other than that relating to the proposed shift changes, no evidence was presented by the Company to show that "a group of employees . . . were resisting management directives." General Counsel did, however, present testimony (denied by O'Rorke) that, O'Rorke said, among other things, that the employees had cut their throats by bringing in the Union.

This brings me to the arguments advanced by Company counsel at the hearing, and to General Counsel's position that the arguments constitute an admission that the alleged discriminatees were in fact terminated in violation of the Act. In order to examine this position in proper prospective, it is necessary at this point, to summarize certain salient facts and testimony adduced at the hearing.

On June 8, the Union filed a petition for a Board conducted election at the East Point facility. The election was held on July 28, with the Union winning by a vote of 5 to 1. On December 14, the Board certified the Union as the collective-bargaining representative of the employees in the following unit:

> All dockmen, drivers and agents employed by the Employer at its operation at 1165 Willingham Drive, East Point, Georgia, but excluding all sales personnel, confidential employees, professional employees, guards and supervisors as defined in the Act.

In the meantime, Nella Ree Dunn, who had been excluded from the election unit by stipulation of the Company and the Union, upon the Company's representation that she was a confidential employee, was discharged on July 11. Her discharge was litigated at the January 25 hearing. On October 19, the Company and Trans-Air entered into a written contract whereby, in sum, Trans-Air agreed to sell its air freight forwarding business to the Company, subject to Civil Aeronautics Board (CAB) approval. On February 10, immediately following such approval, the acquisition took place. It is undisputed that Trans-Air had facilities in 15 cities including

Atlanta (College Park), that the Company also had facilities in each of those cities, and that in each city the facilities were merged as of February 10. It was further stipulated that except in Atlanta, the Company retained all of its personnel on or after the acquisition, with the exception of one part-time employee in Charlotte, North Carolina and one part-time employee in Cincinnati, Ohio. Of the six Atlanta employees who were in the election unit (all of whom voted), Kathy Lee was retained, Ashmore, Rozier, Shepherd and McCollum were terminated, and Moore was offered a supervisory position.[7] Lee, alone among those employees, was outspoken in her opposition to the Union. General Counsel does not contend that the acquisition and the consequent merger of facilities were unlawful. However, General Counsel does contend that Ashmore, Rozier, Shepherd, McCollum and Moore were discriminatorily terminated.

During the reopened hearing, Company counsel sought to question Marlin Rozier about why the employees went to the Union after the unsuccessful plan to change shifts. After General Counsel objected to this line of questioning, and questioned what this had to do with the alleged discriminatory terminations. Company counsel explained as follows:

> "I have a right to show that we have an unreliable group of employees and were certainly allowed to take that into account in making our decision (Tr. 926)
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> When a group of people are told that management wants to change shifts and they refuse to do it. That's unreliable (Tr. 926, 927)."
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7 Moore initially refused the offer but later accepted. General Counsel and the Company differ as to whether, as a matter of law, Moore was terminated. McCollum, who had been a driver-dockman, went to work for an owner-operator who performed pick-up and delivery services for the Company.

"Your Honor, I have been trying to do two things. Number one, I have been trying to show through this witness, based upon testimony brought out by General Counsel, that there were a group of employees there, including himself who were resisting management directives. Number two—

JUDGE ROTH: Is it your contention that certain people were not hired for this reason—were not hired at the new facility for this reason?

MR. JACOBSON: Yes. It was part of an overall analysis of the situation (Tr. 929,930).

It is not a protected activity under the Act for an employee to refuse to perform an assigned work task, including a change in work schedule. However, it is a protected activity for employees, acting in concert, to protest a schedule change or other work assignment. Therefore it is a violation of Section 8(a)(1) of the Act for an employer to discharge an employee because he engages in such activity. *Montgomery Hospital*, 233 NLRB No. 113 (1977), JD at 8; *Transportation Lease Service, Inc. and Allied Stores of Penn-Ohio, d/b/a Pomeroy's Inc.*, 232 NLRB No. 21 (1977), JD at 8.

General Counsel contends that the above quoted statements by Company counsel constitute an admission that the alleged discriminatees were terminated in violation of Section 8(a)(1) of the Act. To an extent, General Counsel is correct. With the sole exception of Marlin Rozier's refusal to accept a shift change, the alleged resistance to management directives consisted of lawfully protected vocal protests against the shift changes. Therefore, to the extent that the Company considered those protests in deciding to terminate the alleged discriminatees, the terminations were unlawful.

Moreover, Company counsel's statements are also significant in two other respects. In the context of the present record, they demonstrate that the Company is advancing pretextural reasons for the terminations, and they constitute an implied adverse reflection upon the credibility of Martin Hoffenberg,

the Company's principal witness. Hoffenberg testified at length as the reasons why the Company decided to staff the merged facility with former Trans-Air employees, with the addition of Kathy Lee, Susan Sinclair (who was hired after Nella Dunn was terminated),[8] and John Moore as a supervisor, and to terminate Ashmore, Rozier, Shepherd and McCollum. However, at no point in his testimony did Hoffenberg claim that this decision had anything to do with the employees' response to the proposed shift changes. Nor, for that matter, did Hoffenberg even claim that the decision was based on an overall appraisal of the employee's work performance or attitude. Rather, the entire thrust of Hoffenberg's testimony was that the Company decided to "retain" all of Trans-Air's Atlanta employees as a group under the leadership of Trans-Air District Manager Robert Heney, in order to retain as much as possible of Trans-Air's domestic freight forwarding business in the southeastern United States. Hoffenberg further testified in sum, that Lee and Sinclair were retained because of their specific job functions, and Moore because of his needed expertise in international operations. Moreover, the evidence concerning the attempted shift changes further demonstrated that Company counsel was advancing a pretextual reason for the terminations. John Moore, who opposed the shift changes, was offered a promotion to supervisor in 1977 and again in 1978, but John Shepherd, who cooperated with management, was terminated with the others on February 10. Therefore, it is evident that the resistence to management directives, referred to by Company counsel, must have involved something more than opposition to proposed shift changes. As the only such resistence engaged in by all of the terminated employees consisted of their support for the Union (which the Company opposed), the inference is warranted that the Company terminated the employees at least in part because of their union activity.

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8 Susan Sinclair, who was a witness at the January 25 hearing, later became Susan Henry. For convenience in reference I shall refer to her as Susan Sinclair.

B. *The Union Organizational Campaign and the Company's Alleged Response*

As indicated, the Union filed an election petition on June 8. This was the first knowledge that the Company had about the organizational campaign. Upon receiving the petition, O'Rorke informed Hoffenberg, who instructed O'Rorke to retain a labor relations consultant. O'Rorke, with Hoffenberg's approval, retained the firm of A. Val Bradley Associates, and Daniel Thompson of that firm became the Company's labor relations consultant in Atlanta. Thereafter Thompson masterminded the Company's campaign against unionization, subject to consultation with and approval by Vice President Hoffenberg. Thompson represented the Company in the election proceeding and at the January 25 unfair labor practice hearing, and was still retained by the Company in September, 1978, when this hearing closed. As will be discussed, Thompson's forte seems to consist of freely and unabashedly advising employers to violate the Act, and of making such misrepresentations to the Board as may be deemed necessary to advance his client's interests. As will be further disscussed, the Company willingly accepted his advice, and when it did not, the Company acted otherwise for tactical reasons, and not because of any reluctance to violate the law.

1. The Wage Freeze

The Company has a policy of reviewing its employees for pay increases after their initial 6 months of employment, and thereafter annually. Until June, 1977, wage increases recommended by District Manager O'Rorke for employees at the East Point facility were routinely approved by Regional Manager Pshirer. However, the Company's first move upon receiving the election petition was to announce a wage freeze. O'Rorke told the employees that "pay raises would be frozen until the Union matter was cleared up." O'Rorke so testified at the January 25 hearing and in the investigatory affidavit which he gave to the Board's Regional Office. However, at the reopened hearing, O'Rorke testified that he told Lynn

Ashmore and Nella Dunn that all raises were frozen until the NLRB petition was cleared up. I find that O'Rorke's admission in his affidavit and January 25 testimony is a more reliable indication of the truth than his later testimony, which was given after Company counsel had an opportunity to appraise O'Rorke of the potential significance of his words in the reopened case.[9] Therefore, the Company violated Section 8(a)(1) of the Act by threatening to withold pay raises because of the Union. In either event, O'Rorke's statement was unlawful. It is settled law that an employer's legal duty in deciding whether to grant benefits during a union campaign "is to determine that question precisely as if a union were not in the picture." *Newport Division of Wintex Knitting Mills, Inc.*, 216 NLRB 1058 (1975). A threat to engage in unlawful conduct is in itself unlawful. Therefore the Company violated the Act by threatening its employees with a wage freeze, whether because of the Union or the pendency of the Union's petition, and regardless of whether it carried out such a policy.

Nevertheless, O'Rorke attempted to minimize the offense. O'Rorke testified that he and Thompson, with Hoffenberg's approval, agreed upon the wage freeze in order to avoid the impression that the Company was trying to influence its employees. I find this assertion incredible. Thompson had extensive experience in Board proceedings and he must have known (at the very least, long before January 25), that what the Company was doing was unlawful. Moreover, the evidence indicates that after June 8, the Company exercised its wage increase policy in a discriminatory manner.[10] In a memo which

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9 Ashmore testified that O'Rorke said that because someone was interested in having a union, all wages and promotions were frozen. However, in his affidavit, Ashmore said nothing about promotions. I find that O'Rorke referred only to raises.

10 In part, this finding has necessitated consideration of evidence relevant to the settled case (10-CA-13141) involving the allegation that the Company discriminatorily witheld promised wage increases from Marlin Rozier and Lynn Ashmore. I ruled at the hearing that I could properly receive and consider such evidence, and I adhere to that ruling. The Company did not object to General Counsel's presentation of such evidence

O'Rorke sent to Regional Manager Pshirer about August 1, while Company objections to the election were pending before the Board, O'Rorke recommended a 6-month pay increase for employee Kathy Lee "based upon the idea that the Union's position here in the [East Point facility] will be weakened and the progress of ratification deferred." O'Rorke admitted that the memo reflected Thompson's advice. The recommendation was carried out, notwithstanding the Company's professed wage freeze. It was stipulated at the January 25 hearing that Lee received her raise in late November, retroactive to October 1. In the meantime, the Company held up raises for union adherents Rozier and Ashmore, which had been recommended on or about June 28. Rozier and Ashmore did not receive the raises until January 25, and then only pursuant to the settlement agreement in Case No. 10-CA-13141.

Martin Hoffenberg testified that he never saw or approved the memo from O'Rorke to Pshirer. I do not believe him. I find it unlikely that Pshirer would have acted on a sensitive labor relations matter without routinely passing the memo on to Stamford for Hoffenberg's attention. In fact, this was done in a similar situation involving James McCollum, which will be discussed, *infra.*[11] I find that the wage freeze was imposed, and

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at the January 25 hearing, and itself presented evidence concerning the allegation in the settled case. The Company thereby waived any defense it might have had to the exclusion of such matter. Moreover, the settlement agreement expressly provides that "[a]ny evidence relating to issues involved in this agreement may be introduced in the record in the hearing of Case No. 10-CA-12941." Even absent such express provision, evidence involved in a settled case may properly be considered as background evidence in determining the motive or object of a respondent in activities occuring either before or after the settlement, which are in litigation. *Steves Sash & Door Company* v. *N.L.R.B.*, 401 F. 3d 676, 678 (C.A. 5, 1968). If evidence from a settled case may be used in a case which is in litigation, then *a fortiori,* evidence from a case which has been or is being litigated may be considered in a second case which is in litigation.

11 Consequently, the inference is warranted that the memo concerning Lee was obtained by General Counsel in the voluminous documents turned over by Respondent pursuant to General Counsel's subpoena *duces tecum*

thereafter carried out in a discriminatory manner, as part of a calculated campaign to undermine the Union.

2. The Discharge of Dunn

A hearing on the election petition was scheduled for June 26. However, on that date the Company and the Union agreed upon the composition of the unit, thereby obviating any need for a hearing. The parties executed a stipulation for certification upon consent election, which was approved by the Board's Regional Director. Upon the Company's representation that Nella Ree Dunn was a confidential employee, the Union agreed to exclude her from the unit. The Company, i.e., O'Rorke and Thompson, also represented that Marlin Rozier and John Moore was supervisors. However, the Company agreed to include them in the unit.[12] As will be discussed, all of these representations were false.

As indicated, the election was held on July 28, with the Union winning by a vote of 5 to 1. In the meantime, on July 11, the Company discharged Dunn. Following the election, the Company filed written objections to the conduct of the election, stating as follows:

COMPANY OBJECTIONS

THE UNION CAUSED INTERFERENCE WITH THE ELECTION AND FREE VOTING CHOICE THROUGH THE CONFIDENTIAL SECRETARY'S MISACTION OF DISCLOSING CONFIDENTIAL DATA THAT SHE HAD ACCESS TO AND

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directed to Hoffenberg's attention. Therefore, the memo was properly obtained. See, *General Engineering, Inc. and Harvey Aluminum*, 123 NLRB 586, n. 2 (1959).

12 At the January 25 hearing, O'Rorke testified that he maintained that both Rozier and Moore were supervisors. In the reopened hearing, O'Rorke attempted to back away from this admission, testifying that he described Rozier as a "lead agent." However, when confronted with his earlier testimony, O'Rorke admitted that he took the position that both Rozier and Moore were supervisors.

WRONGFULLY GAINED OTHER CONFIDENTIAL DATA AND DISCLOSED THAT ALSO.

EMPLOYER OBJECTION IS THAT SUCH INFORMATION WAS UNION INDUCED IN THAT IT BECAME OBVIOUS THAT DISCLOSURES WERE MADE PURPOSELY TO ALLOW THE UNION TO GAIN ADVANTAGE IN THE CAMPAIGN, TO WIT: TWO OF THE MORE ARDENT, SELF-PROFESSED UNION SUPPORTERS (MOORE AND SHEPHERD) DISCREDITED THE COMPANY BY PROVIDING CONFIDENTIAL SALARY DATA TO OTHERS IN THE UNIT. THE ONLY WAY THEY COULD HAVE OBTAINED SUCH DATA WAS FROM THE SECRETARY. TIMELINESS OF THESE DISCLOSURES IS A MOOT ISSUE IN THIS INSTANCE SINCE THERE IS NO EFFECTIVE RE-BUTTAL TO SUCH A SITUATION.

THE EMPLOYER KNEW THIS INFORMATION WAS BEING DISCLOSED WHEN OTHERS IN THE VOTING UNIT (LEE AND ROSIER) VOLUNTARILY MADE SUCH KNOWN TO THE DISTRICT MANAGER. *UPON DISCOVERY OF ABOVE DISCLOSURES, THE EMPLOYER WAS FORCED TO DISCHARGE THE SECRETARY.* REASSIGNMENT OF HER TO OTHER WORK, OR ASSIGNMENT OF ANOTHER EMPLOYEE TO HANDLE CONFIDENTIAL DATA WAS INFEASABLE DUE TO THE NATURE AND SIZE OF THE OPERATION. THE RESULT OF THE ENFORCED DISCHARGE ITSELF WAS FURTHER USED TO THE UNION'S ADVANTAGE IN CAMPAIGNING THROUGH DISCREDITING THE DISTRICT MANAGER IN THE EYES OF ALL EMPLOYEES. THE EMPLOYER WAS UNABLE TO REBUT THIS ISSUE ALSO. [Emphasis added].

The Company admits that Dunn was the "confidential secretary" referred to in its objections. O'Rorke further pinpointed

the source of his information concerning the alleged disclosures. O'Rorke testified that Kathy Lee reported to him that Shepherd and Moore were talking to Dunn about Mike Floyd's salary. On December 14, the Board affirmed the Regional Director's rejection of the objection, and certified the Union as bargaining representative.[13]

Notwithstanding its unqualified assertion that it was forced to discharge Dunn because she was disclosing confidential data, the Company has throughout this proceeding, shifted from one explanation to another in an effort to justify its discharge of Dunn. At one point in the January 25 hearing, O'Rorke conceded, *de facto,* that the Company had violated the Act by discharging Dunn. O'Rorke testified that he discharged Dunn in order to put a stop to leaks about what employees were making "and employees' dissention over pay raises." Putting aside the matter of leaks for the moment, it is a violation of Section 8(a)(1) of the Act to discharge an employee, in whole or in part, in order to "stop . . . employee dissention over pay raises." Section 7 of the Act guarantees the right of employees to engage in such dissention, and the Company interfered with, restrained and coerced its employees in the exercise of that right by discharging Dunn. In the reopened hearing, the parties were afforded full opportunity to present new or additional evidence with respect to the allegations in Case No. 10-CA-12941. The Company, although opposing consolidation of the cases, availed itself of this opportunity. Company counsel was meticulous and thorough in meeting each and every allegation of both complaints.

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13 O'Rorke testified that Vice President Hoffenberg instructed him to file the objections because it "looked like a sound basis." Therefore, it is evident that Hoffenberg was familiar with the circumstances of Dunn's discharge. The Company, with Hoffenberg's approval, also filed objections alleging threats by union agents, and that a union agent improperly voted, but withdrew those objections when it became apparent that they could not be substantiated. On December 22, the Company, by Hoffenberg, addressed a motion to the Board to "stay issuance of certification" and grant other relief. In fact, the Union had already been certified. On January 27, the Board issued an order denying the motion as "lacking in merit."

However, O'Rorke was not asked to explain or elaborate upon his above quoted testimony. His silence speaks louder than words, and the admission still stands.

In its objections to the election, the Company described Dunn as a "confidential secretary" whom the Company was "forced to discharge . . . upon the discovery of [her] misaction of disclosing confidential [salary] data." In fact Dunn was not a confidential secretary. Rather, she performed clerical and administrative functions of a routine nature. To the extent that she dealt with "confidential" information, such material was customer rather than employee information. She did not participate in management discussions, and even O'Rorke conceded that by June 28 she was not performing any confidential duties. Moreover, the alleged salary information leaks, if they took place at all, took place well before her discharge on July 11. O'Rorke testified that the leaks in question consisted of (1) Dunn passed along information as to the salary of Floyd, who replaced James Broadaway as station manager in May, and (2) Dunn asked for a raise because Rozier and Ashmore had been put in for raises, which was supposedly confidential information. O'Rorke had recommended the two employees for raises on June 28. In fact, salaries and rates of pay of East Point personnel were common knowledge among the employees, and the Company had no rule which prohibited employees from discussing their salaries or the salaries of other personnel. Indeed teletype tapes, including those which might reflect such "confidential" information, were commonly discarded in wastebaskets. In the reopened hearing, Floyd, who did not testify at the January 25 hearing, testified that everybody knew what everybody was making, and that when employees mentioned to him what he made, he did not even bother to inquire or find out how they obtained such information. In sum, such information was not confidential. Significantly, Floyd testified that it was O'Rorke, and not himself, who complained about alleged breaches of confidentiality.

As an adverse witness for General Counsel at the January 25 hearing, O'Rorke testified that in addition to the leaks, he

discharged Dunn because she was unable to do her job. In this connection, O'Rorke testified that in early 1977 he gave Dunn increased responsibilities, consisting of routine administrative work which had thereto been performed by Station Manager Broadaway. However, in his affidavit which he gave to the Board's Regional office, O'Rorke came up with a different excuse. O'Rorke stated that the Company decided to fire both Broadaway and Dunn (presumably in April) because business was stagnant. In the same affidavit O'Rorke admitted that the East Point facility's business increased over 60 percent from January to June, 1977. As for Dunn's alleged inability to do her job, O'Rorke admitted that he never criticized or complained about Dunn's work, but that his knowledge in this regard was based on the fact that Broadaway complained about her work. However, in his affidavit O'Rorke stated that he thought Broadaway was covering up for Dunn. If in fact Dunn was not performing her work while Broadaway was station manager; i.e., prior to May, then it is difficult to understand why O'Rorke would have waited until July 11 to discharge her for such poor performance. The Company apparently recognized this incongruity, and consequently at the reopened hearing, O'Rorke presented an explanation.[14] O'Rorke testified, in sum: that in April, he decided to fire both Broadaway and Dunn because he had trouble getting a replacement for her (although the Company went without a station manager for about a month);[15] and that notwithstanding Dunn's alleged inability to do accounting work, and his decision to terminate her, he continued to gradually increase her responsibilities from February until her discharge. I find this explanation incredible. Dunn's replacement, Susan Sinclair, did not begin working for the Company until nearly the end of

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14 The company evidently felt that it was safer for O'Rorke to testify about employee work performance than about "employee dissention."

15 At one point, O'Rorke testified that Broadaway was terminated in early June. In fact, Broadaway was terminated in late April, and Floyd took over as station manager on May 27.

July. Moreover, Mike Floyd, who was belatedly presented as witness in the reopened hearing, impliedly contradicted O'Rorke. Floyed testified that he was never told that Company was seeking to replace Dunn, and that he was unaware of any problems in the accounting work until mid-June, when he allegedly first complained to O'Rorke about Dunn's deficiencies. Rather, Floyd inferred that O'Rorke decided in early July (while Dunn was on vacation) to terminate her. Floyd testified that O'Rorke then said that he would "act" on Floyd's complaints.

James Broadaway, who was presented as a witness for General Counsel at the January 25 hearing, testified that Dunn's work was very good, that he never complained about her work, and that O'Rorke never told him to complain to Dunn about her work. Dunn testified that O'Rorke complimented her work. I find no reason to disbelieve Broadaway, who appeared to be a candid witness. In contrast, I have ample reason to disbelieve O'Rorke and Floyd, in view of their shifting, inconsistent and inherently inplausible excuses for discharging Dunn. Moreover, the fact that O'Rorke continued to give Dunn increased responsibilities until the time of her discharge, further tends to indicate that O'Rorke regarded her as a well qualified employee. I credit Broadaway and Dunn.

In his January 25 testimony O'Rorke hinted at the real reason for Dunn's discharge. O'Rorke testified "that there seemed to be a little collusion" between Dunn and Moore and Shepherd, the two "more ardent, self-professed union supporters" referred to in the Company's objections to the election. O'Rorke never directly accused Dunn of leaking confidential information. Rather, upon summarily terminating Dunn he simply told her that he didn't "really have any trust in her any more as a confidential secretary." In sum, O'Rorke suspected that Dunn was involved in union activity, and as far as he was concerned, while it was bad enough to have the employees talking union, it was too much to take to have his own secretary engaging in such activity. After the Union agreed to exclude Dunn from the election unit, O'Rorke saw an opportunity to get rid of Dunn under the pretext that she had breached her role as an allegedly confidential secretary. In fact,

it is questionable whether Dunn engaged in any union activity. Although presented as a witness for General Counsel, Dunn never testified that she engaged in such activity. However, O'Rorke discharged Dunn because he suspected that she was participating in the Union campaign. Therefore, the Company, by discharging Dunn, violated Section 8(a)(1) and (3) of the Act. *N.L.R.B.* v. *Link-Belt Co.*, 311 U.S. 584, 589-90 (1941).

3. Monitoring of Union Activity

On September 30, District Manager O'Rorke sent a memo to Regional Manager Pshirer in which he recommended that John McCollum be changed from a part-time to a full-time employee. O'Rorke advanced several reasons, including the following: "It has also been brought to our attention by Val Bradley Associates that we will be able to soften the Union's control in this station by having at least two out of the six operations people not carrying a union card." The memo was received in Pittsburgh on October 6, and passed on to corporate headquarters in Stamford. Assistant Vice President Frank Cassi referred the memo to Hoffenberg with the following inquiry next to the above quoted recommendation: "Marty do you agree?" Hoffenberg's written response was "No." However, on November 15 McCollum was made a full-time employee.

Hoffenberg testified that he answered "No" to Cassi's inquiry because the recommendation would indicate that the Company was acting improperly, and because it made no sense because the facility was either all union or nonunion. Hoffenberg further testified that the matter had nothing to do with the pending acquisition of Trans-Air's business. I do not credit this explanation. On its face, Hoffenberg's terse "No" simply reflects disagreement with the factual premise that the Union's strength would be undermined if McCollum were made a full-time employee. This inference is further borne out by other evidence in this case. The Company had been fighting unionization for nearly 4 months. By this time, Dan Thompson and O'Rorke were undoubtedly fully familiar with the Company's policy toward the Union. They would not have

recommended discriminatory action if they had reason to believe that the Company had scruples against violating the Act. In fact, as heretofore found, it did not. Thompson testified that O'Rorke told him that he had information that McCollum was not for the Union, and Thompson advised him that if the Company had two full-time nonunion employees (i.e. Lee and McCollum), they might be able to continue operations during a strike.[16] However, Hoffenberg was so involved in fighting the Union in Atlanta that he had better information than Thompson and O'Rorke. On cross-examination, Hoffenberg reluctantly admitted that he kept close tabs on the union sentiments of the Atlanta employees. Hoffenberg admitted that he made entries on a list of employees describing each as "activist," "neutral" or "opposed." Hoffenberg admitted that he may have made such entries before or after the acquisition agreement, or both, and that the entries referred to the Union's attempt to organize in Atlanta. Hoffenberg further admitted that he "certainly" referred to Kathy Lee as "opposed," that he referred to John Moore as "activist," and he may have referred to McCollum as "neutral." In sum, Hoffenberg was not sure where McCollum stood. For economic reasons, including a continuing growth of business in Atlanta (see Pshirer's memo to Cassi), McCollum was made a full-time employee, and remained in the Company's employ until the acquisition, when he was terminated along with the activists. However, McCollum was treated in a different fashion than Dunn, Rozier, Ashmore and Shepherd. McCollum was terminated, and thereby hopefully excluded from any possible bargaining unit, but he was tolerated to work for one of the Company's owner-operators. As will be discussed, the Company solved its desperate need for John Moore's expertise and ability in a parallel fashion. Furthermore, it is significant that even after the acquisition agreement, the Company continued to monitor the union sentiments or its employees and to explore ways of undermining the Union's position. Hoffenberg

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16 Georgia law prohibits the union shop, as Hoffenberg undoubtedly knew.

would not have been concerned if only a few months operation at College Park were involved. Rather, it is evident that he was looking forward to the staffing arrangements which would be made when the acquisition was consummated.

C. *The Trans-Air Acquisition, and Events Culminating in the Acquisition on February 10, including Alleged Violations of Section 8(a)(1), (3) and (4) the Act*

1. The alleged conversations between O'Rorke and Lynda Molanders

Lynda Molanders was employed at the East Point facility as account executive (a sales position) from January, 1977 until October 28, when she voluntarily quit her job in order to take a position with one of the Company's competitors. Molanders testified in sum, that during the period from June until shortly after she left the Company's employ, she had a number of conversations with Frank O'Rorke concerning the Union and the impact of the pending Trans-Air acquisition. Molanders testified that a few weeks before the election, O'Rorke, in the presence of Mike Floyd, told her that the Company could end up closing the station and reopening as an agent if the election came through, and that other stations had done this.[17] Molanders testified that after the election, O'Rorke told her that the Company was not going to allow the Union at Atlanta, and would ultimately get rid of the employees who voted for the Union. Molanders further testified that in late October, during her last week at work, O'Rorke talked to her about the impact of the pending Trans-Air acquisition. According to Molanders, O'Rorke, in the presence of Mike Floyd, told her that Bob Heney would be district manager, and had contracted with Company Vice President Dick Friedl to take over as station manager. O'Rorke added that Heney would not allow the Union in there. O'Rorke further said that the guys at Trans-Air were afraid to mention union to Heney, and that the guys who

17 Air Freight forwarding firms sometimes utilize an agent, rather than maintain their own offices in particular cities.

voted Union would not be able to stay because Heney wouldn't keep them. Molanders testified that 2 or 3 days before she left the Company, O'Rorke told her that he had met with Friedl, and that the Company might or might not keep Moore and Shepherd. However, on her last day of work (October 28), Molanders asked O'Rorke what the situation was with the Union. O'Rorke told her that it was pending in Washington, and probably wouldn't go through, that the Company had "protested" it, but that even if it did, "those guys" weren't going to win because they weren't going to have jobs. O'Rorke added that "those guys" had "cut their throats" by bringing in the union. Molanders testified that Kathy Lee was nearby during this conversation. Lee was not presented as a witness by either side. Molanders testified that in a subsequent conversation, O'Rorke told her that Trans-Air wasn't going to keep any of the employees and that he wasn't going to worry about them. However, he told Molanders that he had gone out on a limb to protect the jobs of Kathy Lee and Mike Floyd. As for himself, O'Rorke told Molanders that he would remain a "floater" until the acquisition, and then the Company would tell him where he was going. O'Rorke said that he expected to be given a staff position in Stamford. Molanders further testified that shortly before her resignation, Vice President Friedl told her, with respect to the acquisition, that the Company would be Air Express but the personnel would be Trans-Air. O'Rorke testified that Molanders did in fact have a private conversation with Friedl; however, Friedl was not presented as a witness.

In his testimony, O'Rorke, in sum, denied that the alleged conversations took place. Mike Floyd, in his testimony, either denied that such conversations took place in his presence, or asserted that he could not recall such conversations. For the reasons discussed herein, I credit Molanders.

First, Molanders impressed me as a candid witness. In contrast, as indicated throughout this Decision, I have been given ample reason to question the credibility of O'Rorke and Floyd. I do not agree with the Company's argument that Molanders cannot be believed either because she now works

for a competitor, or because she used Nella Dunn as a reference when she applied for her job with the Company. Molanders did not hesitate to admit facts which might seem adverse to the interest of General Counsel, the Union or herself. She candidly admitted that she solicited business from former customers of Trans-Air and Air Express. Molanders bore no grudge against the Company. Although she did not think much of Susan Ward, her immediate supervisor, she left the Company under amicable circumstances. The Company thought well of her, and both Friedl and O'Rorke attempted to dissuade her from leaving. Although intensively cross-examined by Company counsel concerning her numerous alleged conversations, her testimony remained consistent, including the order in which the conversations took place. It is unlikely that this would have happened if she had contrived the fact of such conversations. Her answers also demonstrated a spontaneity which would not likely have eminated from a witness who was not telling the truth. For example, in testifying concerning a conversation which was also referred to in her affidavit (Judge's exhibit 4, paragraph 7), Molanders recalled that O'Rorke said that the Company had "protested" the election, although that word is not contained in the affidavit. It is evident that Molanders used the affidavit only for the proper purpose of refreshing her recollection, and that she was testifying on the basis of her own independent recollection of the conversations.

Moreover, Molanders' testimony is corroborated by the fact that the statements attributed to O'Rorke reflected developments that were actually taking place, or would shortly take place, and that it is unlikely that Molanders could have learned of some of these matters from any source other than O'Rorke. The coincidence of statement and fact also tends to indicate that to a considerable extent, O'Rorke was privy to management's planning and knew what he was talking about. When O'Rorke said that Bob Heney had contracted with the Company to take over as station manager, he was speaking the truth. As a condition of the Trans-Air acquisition, Trans-Air President Howard Schor solicited and obtained from certain

key Trans-Air personnel, signed employment contracts. The contracts, which each had a duration of one year, were nominally between Trans-Air and the key person (a manager or sales executive), but in fact were between the key person and the Company, i.e. Air Express. The contracts, which were identical in form except for salary and position, provided that they were conditioned upon the Company's acquisition of Trans-Air's air freight forwarding business, and would remain in effect after the acquisition. Acceptance of each contract was acknowledged in writing by an official of Air Express. Heney's contract, dated October 19 (as were the other contracts) and signed by him on or about that date, provided that he would be Atlanta District Manager and would receive a raise at the time of acquisition. As heretofore indicated, the acquisition required CAB approval. The Company and Trans-Air originally anticipated that such approval would take place before the end of 1977; however, the acquisition was not approved until February 9. The employment contracts purported to constitute the entire understanding of the parties, and were silent on the matter of union representation. However, it does not follow from that fact that the Company and Heney had no understanding or agreement concerning union representation. Although the acquisition agreement was not executed in writing until October 19, the Company and Trans-Air had agreed upon the sale in September. Thereafter, in late September, Company President Joseph Berg and Vice President Fred Schwartzstein met with certain Trans-Air district managers, and Heney met privately with Berg. This aspect of the case will be discussed further in connection with alleged unlawful statements by Heney, and again with respect to the alleged unlawful terminations.

When O'Rorke told Molanders that he would temporarily be a "floater" he was telling the truth. As of February 10, O'Rorke became Regional Sales Manager for the Company's newly constituted Southeast Region (Charlotte and Atlanta). However, this was only a temporary position for him. As of the completion of his testimony in this case, in August, 1978, the Company transferred O'Rorke to New York, to become

Regional Manager of its New York Metropolitan area. Finally, "those guys" evidently referred to the voting unit employees (all of whom but Lee were male), who the Company believed voted for the Union. In sum, I credit Molanders' testimony concerning her conversations with O'Rorke. Molanders was outside the bargaining unit, was the Company observer in the election, and O'Rorke thought he could safely talk to her and to Kathy Lee (and perhaps thereby get the message across to others). As men sometimes do (and as Heney was also doing at College Park) O'Rorke let his hair down when talking to a woman. I find, as alleged in paragraphs 12, 16, 17 and 20 of the complaint, that the Company, through its supervisor and agent Frank O'Rorke, threatened its employees with loss of their jobs or other reprisal because of employee support for the Union, and thereby violated Section 8(a)(1) of the Act. Although not specifically alleged in the complaint, I find that the Company further violated Section 8(a)(1) when O'Rorke threatened that the Company might close the Atlanta station and reopen as an agent if the employees voted in the Union.[18]

I further find that O'Rorke's statements evidence that the Company intended to and did ultimately terminate most of the unit employees in reprisal for their adherence to the Union, and in order to destroy the Union's representative status. In addition to other factors, some of which have heretofore been discussed, O'Rorke's statements tend to explain why O'Rorke was never allegedly consulted in the staffing decisions which

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18 The alleged conversations between Molanders and O'Rorke were fully and fairly litigated, without pertinent objection, and therefore the finding in question is warranted. Although the conversation took place in June, and the charge in Case No. 10-CA-13496 was filed in February, 1978, the time limitation of Section 10(b) of the Act was tolled by the filing of the earlier charge in Case No. 10-CA-12941, wherein the Union alleged that the Company violated Section 8(a)(1) and (3) of the Act by its discharge of Nella Dunn and by "other acts." As the instant matter is similar to and arises out of the same alleged course of conduct involved in Case No. 10-CA-12941, Section 10(b) does not bar consideration of the matter. See, *Laborers International Union of North America, Local No. 282 (Millstone Construction Co.)*, 236 NLRB No. 70 (1978), JD at 22.

Hoffenberg made for the post-acquisition (College Park) facility. One might reasonably expect that as Atlanta district manager, and being well regarded by management, O'Rorke would have had some input into those decisions. However, Hoffenberg testified that the Company's executive committee made those decisions after consulting Robert Heney, but without consulting O'Rorke. O'Rorke made no recommendations, at least not on the basis of any non-discriminatory considerations, because he knew long before February 10 that the Company intended to get rid of the Union adherents, and he concurred in that policy. O'Rorke was willing, as he told Molanders, to stick his neck out for Floyd and Lee, but for no one else—not even John Moore, whose ability and expertise in the international field were badly needed, nor John Shepherd, who had loyally gone along with his plan to change shifts.

2. Alleged Interrogation at East Point

John Shepherd testified on several occasions, including one which took place a few days before February 10, Station Manager Mike Floyd asked him and John Moore if they were going to the Union hall for lunch. Shepherd's testimony was not contradicted. It is undisputed that at all times material, Floyd was and is a supervisor and agent of the Company within the meaning of Section 2(11) of the Act. I credit Shepherd. Floyd had no legitimate reason to question the employees about their union activities. His questioning occurred in the context of serious and continuing unfair labor practices, and was not accompanied by any assurances against reprisal. Therefore, Floyd's conduct tended to be coercive. See, *Naum Bros. Inc.*, 240 NLRB No. 50 (1979), sl. op at 2. In the context of the Company's overall course of conduct, I further find that Floyd's questioning was in fact intended to intimidate the employees in the exercise of their statutory rights. By coercively interrogating Shepherd and Moore concerning their union activities, the Company violated Section 8(a)(1) of the Act.

John Shepherd further testified that on the Saturday before the January 25 hearing in this case (January 21) Frank

O'Rorke asked him if he had been subpoenaed. According to Shepherd, he answered that he had, whereupon O'Rorke responded that Shepherd really didn't have to answer, that he just wanted to know "if everyone was going to be down there." Shepherd further testified that O'Rorke said that it looked like everyone was going to be down there and that he was concerned because he needed people to run the facility that day. General Counsel contends, in sum, that O'Rorke had no legitimate reason for questioning Shepherd and that the Company, by O'Rorke and Mike Floyd, violated Section 8(a)(1) by interrogating Shepherd and other employees about whether they had been subpoenaed to attend the hearing. O'Rorke, in his testimony, denied that he asked Shepherd if he got a subpoena. Resolution of the credibility issue thus posed, and of the merits of General Counsel's position, necessitates consideration of testimony and other evidence concerning conversations and events which preceeded the hearing and the situation on the day of the hearing.

The hearing in Case No. 12941 was originally scheduled for October 18. However, by order of the Regional Director dated October 18, the hearing was rescheduled to January 25. By subsequent order dated November 23, Case No. 12941 was consolidated for hearing with Case No. 13141 on January 25. Subsequently, General Counsel served a subpoena on Frank O'Rorke, which was dated January 9. General Counsel admitted that John Moore and Shepherd were subpoenaed to testify, but asserted that neither was present at the hearing. General Counsel further conceded that Marlin Rozier and Lynn Ashmore were present at the hearing, and asserted that Moore and Shepherd were not. Rozier's presence was noted in the transcript of the January 25 hearing (testimony of O'Rorke). Ashmore testified that he was not subpoenaed to attend the January 25 hearing. Shepherd testified that he received by mail a subpoena from the Board in Case No. 13141, but did not attend the hearing. No specific evidence was adduced as to whether Moore was present at the hearing or whether Rozier was subpoenaed. The settlement agreement in Case No. 13141 was executed on the morning of the hearing. As that case

involved the alleged discriminatory withholding of wage increases from Rozier and Ashmore, it may fairly be inferred that until the settlement agreement was executed, General Counsel anticipated their presence at the hearing, and whether by subpoena or otherwise, so informed them. It may also be fairly inferred that General Counsel issued subpoenas and other notices to appear on or about the same date as that issued to O'Rorke, i.e., on or about January 9.

By letter dated January 12, labor relations consultant Thompson comlained to the Regional Director that the Company was "informed today, January 12, that 100 percent of its operation employees have been subpoenaed," and requested the Regional Director to reconsider whether he needed all of the employees. By a second letter dated January 20, Thompson among other things, complained to the Regional Director that he had not received a response to his January 12 request. In fact, Thompson had received a response in the form of a telephone call from counsel for General Counsel, Paul Tamaroff. Thompson initially testified that Tamaroff told him "that all of the people had been subpoenaed." However, on cross-examination Thompson admitted that Tamaroff told him that "only a few" had been subpoenaed, and that Tamaroff "may" have said that he had made arrangements so that there would be no disruption of the Company's operations. Thompson's admissions on cross examination are a more reliable indication of the truth than the self-serving assertions contained in his correspondence and direct testimony. I find that Tamaroff told Thompson that only a few employees had been subpoenaed, and assured him that there would be no disruption of the Company's operations. It would not have been difficult for counsel for General Counsel to make the assured arrangements. As of January 25, O'Rorke and Mike Floyd were normally at East Point during the day, Kathy Lee, Susan Sinclair and John Moore worked days, Shepherd worked from 7 a.m. to 3 p.m., Rozier and Ashmore worked from 4 p.m. to 1:30 a.m. (evening shift), and John McCollum worked on mid-day shift. In fact, there was no disruption of the Company's operations. The only witnesses called to testify by

General Counsel were O'Rorke, Nella Ree Dunn, former station manager Broadaway, and Susan Sinclair. General Counsel did not originally plan to call Sinclair. However, her testimony was requested during the hearing, when O'Rorke unexpectedly failed to identify General Counsel's Exhibit 7. Rozier and Ashmore, who were also present at the hearing, were not scheduled to report to work until 4 p.m., and lost no time from work. Mike Floyd admitted in his testimony that none of the employees (presumably including Moore) missed work on January 25. If in fact, any employees missed work that day, the Company's timecard records would have reflected that fact. However, no such records were offered in evidence. I find that except as specifically found herein, no employees were subpoenaed by General Counsel or were present at the hearing.

Moreover, it is evident from the testimony of Frank O'Rorke and Mike Floyd that the Company was never informed that "100 percent of its operations employees have been subpoenaed," and that Thompson knowingly made a false representation to the Board in this regard. O'Rorke testified that he told Floyd to find out who was working on January 25, and that some employees voluntarily told him and Floyd that they would not be at work that day. However, O'Rorke later contradicted himself, testifying that "within a couple of days" of the hearing, Moore said he would be at the hearing, that he could not recall any other employee talking to him, and that within 2 or 3 days of the hearing (i.e., after Thompson's January 12 and January 20th letters), he expressed concern to Thompson about employees who would be absent. Mike Floyd also contradicted O'Rorke. Floyd testified that he learned who would be present at the hearing by questioning the employees, that Moore said that he might be off to testify, that Rozier said that he might be late, but that no one else, other than O'Rorke, said that they would be away from work.

I credit Shepherd, and consequently find that O'Rorke interrogated Shepherd about whether he had been subpoenaed by the Board. In light of Floyd's admissions, I find that Floyd

similarly interrogated other employees."[19] In view of Attorney Tamaroff's assurances that there would be no disruption of the Company's operations, the Company had no legitimate reason to engage in such interrogation. Rather, I agree with General Counsel, that in light of Thompson's false assertions in his January 12 letter, the inference is warranted that Thompson was simply engaged in a "ploy" to determine which employees could be expected to testify against the Company. When Thompson failed to trick or cajole the Regional Director into disclosing such information, he instructed or advised O'Rorke to obtain such information directly from the employees. As heretofore indicated, Thompson had no reservations against advising the Company to engage in unlawful conduct in order to defeat the Union, nor did the Company hesitate to carry out such advice. The Company's interrogation with respect to the January 25 hearing was consistent with its repeated monitoring of employee union sentiments and actions taken on the basis of such monitoring. The chronology of events, beginning with Thompson's letter, makes clear that it was Thompson's concern to defeat the Union rather than any possible concern by O'Rorke that he would be shorthanded on January 25, which led to the interrogation by O'Rorke and Floyd.

An employer has a legitimate concern in maintaining normal operations, and to that end may validly be concerned about employee absence from work for a Board hearing. Here, however, any possible legitimate concern was obviated when General Counsel's representative assured Thompson that there would be no disruption of the Company's operations. Therefore, there was no justifications for the subsequent interrogation. Rather, such interrogation constituted unlawful

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19 The complaint (Paragraph 11) names only Floyd as having engaged in such interrogation. However, Company counsel did not object to Shepherd's testimony on this ground, and the matter was fully and fairly litigated. Therefore the issue of interrogation by both O'Rorke and Floyd is properly before me for decision. Indeed, the Company in its brief (p. 100) concedes that both O'Rorke and Floyd interrogated employees about whether they had been subpoenaed.

interference with employee rights protected by Section 7 of the Act. Moreover, the interrogation was coercive in that it was conducted for a discriminatory purpose, in the context of other unfair labor practices, and without any assurances against employer reprisal.[20] Therefore, the Company violated Section 8(a)(1) of the Act. *A.J. Siris Products Corporation of Virginia,* 90 NLRB 132, 137 (1950), enf'd 186 F. 2d 502 (C.A. 4, 1951); see also, *Mr. F's Beef and Bourbon,* 212 NLRB 462, 466 (1974).[21]

3. Alleged Pre-Acquistion Statements by Robert Heney and Tony Chaffin, and the Questions of Single Employer and Agency

Sue Dennison began working in Atlanta for a firm known as Air Land, in January 1975. Robert Heney was district manager of Air Land's facility, having been with Air Land since March, 1972. In March, 1975 Air Land merged with or was acquired by Trans-Air, and in October 1975 Trans-Air moved into the College Park facility which it continued to occupy until the acquisition by Air Express on February 10, 1978. Heney remained as district manager for Trans Air, and Dennison also remained. She performed both secretarial and customer service work. Denison continued working at College Park after the acquisition, until April 21, when she voluntarily quit her employment with the Company, because her husband had been transferred to a position in another city.

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20 Although O'Rorke told Shepherd that he did not have to answer, he did not say this until after Shepherd had answered his question. Floyd, in his testimony, did not claim that he told employees that they did not have to answer, or that he gave them any assurances against reprisal.

21 In *Mueller Brass Co.*, 220 NLRB 1127, 1138 (1975), cited by Respondent, the Board found on the facts therein that the employer's supervisor was only trying to learn for purposes of work scheduling why an employee had to be away from work on a date other than a scheduled Board hearing (n. 9). Therefore *Mueller* is distinguishable on its facts from the present case.

Denison testified that in a series of conversations beginning about November 1, Heney talked to her about the pending acquisition by the Company. Denison's husband was an organizer for the Laborers' Union, and she was particularly interested in the matter of union representation, and personally pro-Union. About November 1, Dennison, who by then was aware of the pending acquisition, asked Heney about what was the latest on the Union deal at Air Express.[22] According to Denison, Heney said that some employees at AEI were involved with the Union, had signed authorization cards, and would be offered jobs when the merger took effect. However, Heney allegedly added that the employees would come over to the Trans-Air building at the time of the merger if they were willing to forget their union activities and not participate in the Union. Denison testified that Heney repeated this theme in subsequent conversations, saying that the Air Express employees would "hit the street" if they did not forget the Union. According to Denison, Heney said that it didn't look like any of the AEI employees would be coming over. Heney also said that he had signed a contract to be district manager for the Atlanta Station, and that the sales staff was being asked to sign contracts with AEI.[23] Denison testified that in December or January, she asked about her own job security. According to Denison, Heney answered that all Trans-Air personnel would remain, that the ones involved with the Union at AEI would not come over, and that he would hire additional personnel as needed. Denison denied that Heney ever said that they had been through previous acquisitions, and that if the employees

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22 Denison testified that Heney initiated this and all but one of the subsequent conversations. However, in her investigatory affidavit she stated that she initiated the first conversation by inquiring about the "union deal." In light of the overall tenor of her description of the conversations, which tend to center around her own inquiries, I find that Denison initiated most if not all of the conversations.

23 Heney testified that he told the employees that he had signed a contract with Trans-Air, so that he would be in charge when the acquisition took place.

stuck with him everything would be all right. Denison further testified that about January 1, she asked Heney about the status of the employees coming over, and about the Union's status. According to Denison, Heney said that it appeared that only O'Rorke, Floyd, Lee, Sinclair and sales employee Marilyn Francis were coming over.[24] However, Heney added that John Moore was experienced in the international field, and was an expert in documents and paperwork. Heney expressed his hope that Moore would reconsider his union activities and come to Trans-Air after the merger.

In mid-January, Frank O'Rorke addressed two meetings of the Trans-Air personnel at College Park, at which Robert Heney was present. The substance of these meetings will be discussed under the next heading. One meeting was for supervisory and sales personnel, and the other for the rank-and-file operations personnel. The latter meeting took place in the evening, when Denison was normally not at work. Denison was not notified in advance of the meeting, and did not attend. The next day she asked Heney why she was not told about the meeting. According to Denison, Heney answered that he thought she would have to be home with her children. Heney's testimony concerning this conversation is enlightening in two respects. Heney testified that he mentioned the children as an additional reason, but that the first reason he gave was that Denison had seniority and so didn't have to worry. Heney also added that customer service was vital. If Heney was not privy to the Company's plans, then it is difficult to see how he could be so certain that Denison had nothing to worry about. It is also incongruous that while Heney was holding out a standard of seniority to the Trans-Air employees, the Company (as will be discussed), was steadfastly rejecting the Union's proposal to staff the post-acquisition facility on the basis of dovetailed seniority of the Air Express and Trans-Air personnel.

Sue Denison further testified that in late January, Heney asked what her husband did. Denison answered that he was a

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24 In her investigatory affidavit, Denison did not indicate that Heney mentioned Sinclair.

union organizer, and questioned why Heney wanted to know. According to Denison, Heney replied that a mutual friend applied for a job and listed her husband as a reference, adding "I hope Frank doesn't find out."[25] Heney testified that he asked about Denison's husband, for the reason indicated in Denison's testimony, and that she told him, but denied her testimony concerning the balance of the alleged conversation. Except as heretofore indicated, Heney in his testimony denied the alleged conversations with Denison, and categorically denied interrogating employees concerning union activity, or threatening employees with discharge or other loss of jobs. However, Heney came up with an explanation as to how Denison could have possibly gotten the impression that he was opposed to unionization. (At this point in his testimony, Heney, who was normally a self-confident and garulous witness, was visibly nervous).

Heney testified that 2 or 3 years earlier, when there was union activity at Trans-Air, he said that if a union came in, he would shut down the facility and operate with management and sales personnel out of his home. Heney's testimony was contradicted by that of his stepson, day operations supervisor Tony Chaffin, who was presented as a Company witness. Chaffin testified that Heney has explained his policies regarding unionization of Trans-Air "for the whole five years I've worked there," about once a year, whenever the Company has "trouble," meaning whenever some people "want a Union," and has explained those policies to him and to other employees. During the pre-acquisition period, the Union was a topic of discussion among employees at College Park as well as at East Point; indeed, as will be discussed, the matter was raised at the January meeting conducted by O'Rorke. The inference is warranted that Heney explained his policies concerning unionization (including, by his own admission, threats of loss of jobs) during the pre-acquisition period. Therefore, I credit Denison, notwithstanding some contradictions in her testi-

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25 Parenthetically it might be noted that at College Park, O'Rorke was giving similar warnings about Heney.

mony, and I find that her testimony reflects in substance what Heney told her.[26] I find that Heney, by his statements to Denison, threatened employees with discharge or other loss of employment because of their union activities, and further impliedly threatened employees with loss of employment or other reprisal if they engaged in such activities. However, as the Company (Air Express) is the only employer named as a respondent in this proceeding, Heney's statements cannot be made the basis of a finding of unfair labor practices by the Company unless the evidence indicates that Heney was clothed with actual or apparent authority to speak for or on behalf of the Company. The complaint alleges, but the Company denies that Heney was a supervisor and agent of the Company during the period from October 19, when the Company and Trans-Air executed the acquisition agreement, until February 10, when the acquisition took place. I shall now address myself to the issue thus presented.

General Counsel contends that during the period in question, the Company and Trans-Air constituted a single employer within the meaning of the Act; and consequently that Heney, as a supervisor and agent of Trans-Air, was also a supervisor and agent of the Company. General Counsel's theory of a single employer relationship rests upon two assertions of fact, which are set forth in paragraphs 4 and 5 of the complaint. They are, in sum: (1) that on October 19 the Company entered into a purchase agreement whereby it agreed to purchase the equipment and facility used by Trans-Air at College Park, and

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26 I am not impressed by the Company's argument that Denison should not be believed because she is pro-union. By the same type of reasoning, I would have to discredit Heney because he is anti-Union. The evidence also fails to indicate that Denison harbored any grudge against the Company or against Heney. Denison left the Company because of her husband's transfer, and she even offered to train new employees. (Heney never acted on her offer). Denison testified that she understood from another employee that Kathy Lee was present at the January meeting of Trans-Air employees conducted by O'Rorke. As Denison's information was based on hearsay, I fail to see how her mistaken understanding would reflect adversely on her credibility.

(2) that on February 10 the Company closed its purchase agreement and moved its business operations from its East Point facility to the College Park facility previously utilized by Trans-Air. Although the Company filed a motion for a more definite statement of the complaint, including the single employer allegation, General Counsel made clear that it was relying on these two alleged factors. In fact, the allegations of paragraph 4 and 5 were only partially correct. On October 19, the Company entered into an agreement whereby it agreed to purchase the nationwide air freight forwarding business of Trans-Air, which included facilities in Atlanta and 14 other cities. On February 10 the Company closed its purchase agreement with Trans-Air and moved its Atlanta facility from East Point to a facility at College Park which consisted of the former Trans-Air facility, together with adjacent warehouse and office space which was leased by the Company in November. The leased space and the Trans-Air facility were combined to make a facility which was capable of handling a larger volume of business than that handled by the East Point facility prior to the acquisition. However, both the allegation of single employer status, and that of alleged agency, are essentially allegations of fact, and in passing upon their merits I am not limited by the theories of General Counsel. Therefore I have considered all of the relevant evidence adduced in this proceeding in determining the single employer issue, and the related but not necessarily derivative issue of agency.

Trans-Air was a corporate subsidiary of Arrow-Lifschultz Corporation, whose principal was and is Sidney Lifschultz. Lifschultz was Chairman of the Board of Directors of both corporations. The chief operating officer of Trans-Air was its president, Howard Schor. Trans-Air, like the Company, was engaged in the air freight forwarding business. The two firms were competitors, and continued to compete in that business until February 9, when the CAB approved the acquisition. Arrow-Lifschultz and four other corporate subsidiaries were engaged in business in other areas of the freight transportation industry; e.g., surface and maritime shipping. They competed with the Company in some of these areas, and continued to do

so after February 10. However, on and after that date the Lifschultz conglomerate went completely out of the air freight forwarding business, and Trans-Air was a defunct corporation. The acquisition, so far as the present record indicates, was an arms-length transaction between two competing entities in the same industry. During the period in which the parties awaited CAB approval, the Company and Trans-Air continued to conduct their separate businesses, to service their respective customers, to pursue their respective personnel and other business policies, and to maintain their separate staffs. The firms did not take any action to combine or to collaborate in their business activities, even in ways which would have been legally permissible e.g., by co-loading. Therefore, I am not persuaded that during the period from October 19 to February 10, the Company and Trans-Air constituted a single employer. To a limited extent, the Company and Trans-Air were joint employers, through their mutual agent, Trans-Air president Howard Schor, for the purpose of soliciting and obtaining employment contracts from key managerial and sales personnel of Trans-Air, including Heney. Compare, *Springfield Retirement Residence*, 235 NLRB No. 124 (1977). However, the evidence is insufficient to indicate that the Company used Schor as a conduit for its labor relations policies, or that for any other reason, Trans-Air's supervisory personnel should be viewed, *per se*, as supervisors and agents of the Company. [27]

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27 In considering and deciding these questions, I have concluded that General Counsel acted within its allowable discretion in not naming Trans-Air as a party to this proceeding or giving formal notice to Trans-Air of the proceeding. The complaint does not allege that Trans-Air committed any unfair labor practices, nor does General Counsel seek any remedial order against Trans-Air. Therefore General Counsel was not required to join Trans-Air as a party. Nor has the Company been prejudiced by the failure of General Counsel to name Trans-Air as a party to the proceeding. Present or former officials of Trans-Air, who might have knowledge of matters relevant to the subject matter of this proceeding, could have been subpoenaed as witnesses by the Company or any other party. Indeed, Howard Schor, who was president of Trans-Air until the acquisition, is now a senior vice president of the Company. However, he was not called as a witness.

However, this is not the end of the inquiry concerning agency. During the period from October 19 to February 10, many of Trans-Air's managerial personnel, from Howard Schor on down, including Heney, enjoyed a special relationship with the Company. Each was a party to a contract whereby it was understood and agreed that the individual would take on a position with the Company when the acquisition took place. It is not necessary to examine the relationship of each of these persons to the Company during the pre-acquisition period. Indeed, the evidence is insufficient for that purpose. What is important is the relationship which Heney had with the Company. Heney had a contractual committment to become the Company's district manager in Atlanta when the acquisition took place. As of October 19, the parties anticipated that acquisition would take place within about 2 months. Heney had full opportunity to, and did meet with Company officials, including President Berg, before he signed the employment contract. I do not believe Heney's testimony that Berg did nothing more than listen to Heney boast about Heney's magnificent crew.[28] As Heney was a normal human being, and an experienced manager, it is probable that Heney discussed and negotiated, or at least attempted to negotiate the terms and conditions of his pending employment, whether he did so with Berg, Schwartzstein, Hoffenberg, Schor or more than one of them. It is also probable that the Company and Heney discussed the union situation at East Point, the Company's policy toward unionization, and the probable staffing arrangements on acquisition. The union situation at East Point was unique. It was the only Company facility at which a union was in the process of attempting to gain recognition, and the Company was resisting that effort by means lawful and unlawful. (The

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28 The Company did not call Berg as a witness, nor did it call Howard Schor, who allegedly negotiated the employment contracts. If Schor negotiated the contract with Heney, then he did so at least in part as the Company's agent for that purpose, because the contract was in substance, although not in form, an agreement between the Company and Heney. Only the Company could have promised Heney a position and a salary increase.

Company's other facilities were either nonunion or had an established bargaining representative). It may fairly be inferred that Heney wanted to learn the Company's policy at the earliest possible time, and that the Company was equally anxious to inform him of that policy, in order that he might aid in its implementation. The personnel at Trans-Air were aware of the union campaign at East Point, and upon learning of the pending acquisition, were undoubtedly concerned about the impact of both matters upon their own positions. Heney made no secret of the fact that he would remain as district manager after the acquisition. Therefore, the employees looked to Heney as the logical person to answer their questions about these matters. Heney answered their questions, and in so doing conveyed the Company's position, i.e. he conveyed essentially the same message which O'Rorke was delivering at East Point. In sum, Heney was the Company's spokesman at College Park during the pre-acquisition period. In these circumstances, I find that in talking to Sue Denison about the Union and the effects of the pending acquisition, Heney was speaking for and on behalf of the Company, i.e. as an agent of the Company for this purpose. At the least, the Company placed Heney in a position where he had apparent authority to make the statements which he did. Therefore, the Company was responsible for his statements, and thereby violated Section 8(a)(1) of the Act. See, *Marlene Industries Corporation*, 166 NLRB 703, 713 (1967), enf'd *sub nom Decaturville Sportswear Co. Inc.* v. *N.L.R.B.*, 406 F. 2d 886 (C.A. 6, 1969); *Razco, Inc., d/b/a/ Hit' N Run Food Stores*, 231 NLRB 660, 669 (1977) and cases cited therein; see also, Section 2(13) of the Act.

General Counsel further contends that the Company violated the Act through the statements and actions of Trans-Air day operations supervisor Tony Chaffin. General Counsel's principal witness in this regard was Michael Turner, who worked for Trans-Air as a driver-dockman. Turner remained at College Park after the acquisition, and was still employed by the Company at the time of the present hearing. Turner testified that in December or early January, Chaffin spoke to him, possibly in the presence of another employee, Ken Ley.

According to Turner, Chaffin said that it was his job to keep them from joining the Union, and that he had been so instructed in a managerial meeting. Chaffin added that the Air Express employees had joined a union. Turner further testified that in mid-January, Chaffin telephoned him at his home and asked him if he had a union card. Turner answered that he did, whereupon Chaffin allegedly replied that "if anyone of you has a union card we'll have to fire all four drivers." At this point Turner responded that his card was from a shipyard in Virginia. Chaffin, in sum, denied the alleged conversations. Chaffin testified that he did not at any material time threaten anyone with discharge because of union activity, or solicit any employee not to engage in union activity, and that the Company did not ask him to find out who had signed union cards. However, Chaffin testified that he had told the employees more than once about Heney's feelings toward unionization, and, in sum, that he never missed an opportunity to remind them that he was Heney's stepson. As with Heney, the Company denies that Chaffin was a supervisor or agent of the Company at any time prior to February 10. The Company further denies that Chaffin was a supervisor within the meaning of the Act at any time material to this case.

Turner was still employed by the Company at the time of this hearing. Ordinarily, the testimony of such a witness, directed against the interests of his own employer, and possibly of himself, is entitled to considerable weight. However, Turner's testimony as to this and other matters tended to indicate that he was a somewhat less than reliable witness. His testimony concerning O'Rorke's January meeting at College Park was contradictory and demonstrably unreliable. His testimony as to Chaffin's statements tended to be vague and conclusory. I do not believe that Turner was fabricating these conversations out of whole cloth. If this were an ordinary case in which agency were not an issue, it might be sufficient simply to find that Chaffin spoke generally along the lines testified to by Chaffin. However, this is not such an ordinary case. Prior to February 10 Chaffin had no direct relationship with the Company, or any apparent direct contact with the Company beyond his

presence at the meeting of supervisory and sales personnel conducted by O'Rorke. Although agency may be inferred from circumstantial evidence, Turner's testimony must be viewed with caution, for it would tend to indicate that Chaffin was taking a different approach than O'Rorke and Heney. The statements made by O'Rorke and Heney primarily referred to the Air Express employees, and were only inferentially directed at the Trans-Air employees themselves. Whether Chaffin was a supervisor within the meaning of the Act (and this will be discussed further at a later point in this Decision), Chaffin was at best a low level supervisor, and he may have had an inflated opinion of his own importance, based on his relation to Heney. Unlike Heney, the Company did not place him in a position where he had apparent authority to speak on its behalf. While the matter is not free from doubt, I am not persuaded that General Counsel has shown by a preponderance of the credible evidence that Chaffin made the statements attributed to him by Turner, or if he did, that the Company clothed him with actual or apparent authority to speak to or interrogate employees on its behalf.

4. Alleged Promises of Wage Increases

In mid-January the Company, by Frank O'Rorke, conducted a meeting for Trans-Air operations employees, and another meeting for supervisory and sales personnel. The meetings took place at the Trans-Air facility in College Park. Robert Heney was also present at the meetings. Much testimony was adduced concerning the employee meeting. However, certain principal facts are not substantially disputed. Employees David Coker and Paul Norton, who were presented as Company witnesses, were present at the meeting. Coker testified that O'Rorke assured the employees that everyone would have a job, and that although seniority would be in effect, no one would lose their jobs (The employees were aware that the Company's employees generally had been employed for longer periods of time than the Trans-Air personnel). O'Rorke further promised the employees that they would be reviewed twice for pay increases: first within 30 to 60 days after the acquisition

took effect; and again 6 months after the acquisition. Although the Union situation at East Point was discussed at the meeting, O'Rorke did not expressly relate his promises to unionization or lack of union affiliation.[29] Rather, O'Rorke inferred that pay increases might depend on the station's profitability. It is undisputed that the promised increases ran counter to the Company's usual policy, whereby employees were reviewed for increases after their first 6 months of employment, and thereafter annually. General Counsel contends that the Company promised wage increases in order to discourage union activity. Martin Hoffenberg testified that he authorized O'Rorke to promise the extraordinary wage reviews because Atlanta presented a unique situation which was analogous to one encountered by O'Rorke in Boston, where he had been district manager before coming to Atlanta. Hoffenberg testified that in both situations the employees were being paid less than area scale (and in the case of College Park, less than Company scale), and the expedited reviews were utilized as a means of enabling them to catch up, if the growth of business warranted increases.[30] In view of Trans-Air's tendency to drag its feet on promised or anticipated wage increases, Trans-Air employees may well have been earning below area or Company scale at locations other than Atlanta. However, although the Company hired former Trans-Air personnel at other locations, where it also anticipated growth in business, Hoffenberg did not indicate in his testimony that he ever considered imple-

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29 Coker and Norton expressed vocal opposition to the Union at the meeting. Although O'Rorke talked about the Union situation, there is a lack of credible evidence to indicate that he vocally stated the Company's opposition to unionization at the meeting. Michael Turner, the only General Counsel witness concerning this meeting, testified in sum that O'Rorke expressed such opposition. However, his testimony was contradictory and demonstrably unreliable. The four company witnesses who were present at the meeting did not indicate in their testimony that O'Rorke expressly spoke against the Union or solicited the employees not to support the Union, although their testimony varied as what O'Rorke said or did not say.

30 The Company's Boston facility was non-Union, and I have proceeded on the presumption that no discriminatory motive was there involved.

menting expedited wage reviews anywhere else than in Atlanta. Hoffenberg's explanation is rendered further suspect by the lightning speed with which the Company gave retroactive increases to the former Trans-Air personnel. Increases were given before the Company could reasonably have made any meaningful appraisal of the growth situation in Atlanta, particularly in view of the fact that it now had a larger staff. The Company authorized increases for Carl Herrington and Susan Doyle, retroactive to January 1, only 11 days after the acquisition.[31] In the meantime, the facility was in a state of confusion, due to the employees' lack of familiarity with Company procedures. Hoffenberg testified that the increases were intended to make good on increases which Trans-Air had promised to its personnel. However, Robert Heney contradicted Hoffenberg. Heney testified that the January increases varied in amount from, and were not limited to, increases which had previously been disapproved by Howard Schor. In the final analysis, this allegation of the complaint depends to a considerable extent on the case of the alleged discriminatory terminations. If the Company had decided to discriminatorily terminate the East Point employees, then the inference is warranted that the promised wage increases were related to that plan. As will be discussed under the next heading, I have found that the terminations were discriminatory. I find that the Company, having already decided to terminate most of the East Point employees and to replace them with Trans-Air personnel, sought to insure their loyalty by promising them job security (at the expense of the discriminatees) and extraordinary wage increases. I find that the Company promised them such increases in order to induce them not to support the Union, and that the Company thereby violated Section 8(a)(1) of the Act.

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31 Hoffenberg initially testified that the Company did not give retroactive increases, but he promptly admitted that the Trans-Air employees were in fact given increases covering the period from January 1 onward.

5. The Alleged Discriminatory Terminations

On February 9, the Company and Trans-Air were notified that CAB had approved the acquisition. Closing of the acquisition commenced that afternoon, and was completed in the early hours of February 10. On February 10 the Company *transferred* its Atlanta facility from East Point to the location at College Park previously described. Simultaneously the Company *hired* the entire complement of Trans-Air employees (except for two drivers who became owner-operators, performing pick up and delivery services for the Company), and *discharged* all of the East Point personnel except the supervisory and sales personnel, Kathy Lee and Susan Sinclair. As the Company questions the applicability of the underlined words, in whole or in part, to the present situation, I shall explain further.

The Company did not *retain* the Trans-Air employees; rather it hired them. The Company did not retain them because they were not the Company's to retain. Prior to February 10 they were employed by Trans-Air. The Company had no legal or contractual obligation to take them as its own employees. Indeed, at the closing the Company adamantly insisted, in disagreement with Sidney Lifschultz, that the Company had no obligation to hire any Trans-Air employees, and had no obligation either to terminate those employees it did not wish to hire, or to pay them any accrued vacation or other accumulated benefits relating to their employment with Trans-Air.

Second, the Company did not close one facility and open another; rather it transferred its Atlanta facility from the East Point location to the College Park location. Both facilities were near the Atlanta airport and were intended to service the Company's customers through flights leaving from and arriving at that airport.[32] The Company moved its communications and other equipment to the new location, continued to service

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32 The East Point and College Park facilities were some 7 to 10 miles apart, and located on opposite sides of the Airport, which itself is located in the communities of Hapeville, College Park and East Point.

its customers, and attempted to get as many Trans-Air customers as it could.

Third, the Company discharged Ashmore, Rozier, Shepherd, McCollum and Moore. When Shepherd reported to work on the morning of February 10, Mike Floyd told him he was terminated. Floyd called Rozier and Ashmore at home to tell them that they were terminated. Floyd told them that the Company had moved, and therefore that they did not have jobs. McCollum was not presented as a witness. However, the Company in its answer to the complaint, admitted that Ashmore, Rozier, Shepherd and McCollum were terminated.

As for John Moore, it is undisputed: that prior to and again on February 10, he was offered a supervisory position; that he declined the offer on February 10, and was told that there was therefore no work for him; that the offer was held open until March 10, when he accepted a supervisory position at the College Park facility; and that since that time Moore has been given increased responsibilities. Prior to February 10 Moore was not a supervisor. The Company did not offer to keep him in his current job. Therefore, regardless of the Company's motive, Moore was terminated. See, *Wonder Markets Inc.*, 236 NLRB No. 81 (1978), sl. op. at 2.

The Company's answer to the complaint affirmatively asserts that Ashmore, Rozier, Shepherd and McCollum were terminated as "an integral part of a plan of reorganization of its nationwide and southeast operations arising out of its purchase of certain nationwide air freight forwarding assets of Trans-Air." In his testimony, Martin Hoffenberg elaborated upon this defense. Hoffenberg's testimony, together with testimony by Company officials Herbert Bramer and Phillip Rosso concerning the Company's general economic situation, may be summarized as follows: For some years the Company had been experiencing financial difficulties. The Company sought to improve its position in the air freight forwarding business by acquiring the business of another firm. Therefore the Company entered into the agreement to purchase Trans-Air's business. The Company was particularly strong in the field of international operations, whereas Trans-Air was particularly

strong in domestic business, although a negligible factor in the international field. Therefore, the Company had reason to believe that the acquisition would strengthen its overall position in the industry. Trans-Air was particularly strong in the southeastern United States, specifically in Charlotte and Atlanta. The Company hoped to retain (or acquire), as much of this domestic business as possible. The key to retaining this business was the retention of District Manager Heney and his crew, intact. Therefore, the Company decided to retain Heney and his staff, with the addition of the Company's supervisory and sales personnel, Kathy Lee, Susan Sinclair and John Moore. The last three were included on Heney's recommendation, because he said that he needed, in addition to his own people, one customer service employee, one secretary and one international supervisor, and particularly needed John Moore's expertise in the latter capacity.

In a sense, discussion of Hoffenberg's explanation is almost redundant. The Company's discriminatory motive stands exposed by the admissions and arguments of Company counsel, which contradict the testimony of the witnesses, by the admissions of Martin Hoffenberg, by the statements of Frank O'Rorke and Robert Heney, and by other evidence, both direct and circumstantial, which has heretofore been discussed and need not be belabored. Therefore it is not surprising that even apart from such evidence, the record in this case indicates that Hoffenberg's explanation was in fact nothing more than a thinly disguised pretext.

The Company's assertions with respect to general overall economic considerations are hardly in dispute. General Counsel does not contend that the Company's acquisition of Trans-Air was discriminatorily motivated. The Company had experienced financial difficulties, had sought to acquire the business of another firm, and saw in the Trans-Air acquisition an opportunity to improve its own position, particularly in view of Trans-Air's relative strength in domestic operations.[33]

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33 Much testimony was adduced concerning the relative profitability of international (overseas) shipping vs. domestic shipping. In the final analysis,

It also cannot be seriously disputed (and I so ruled at the hearing), that the acquisition, insofar as Atlanta was concerned, necessitated a larger facility and that in consequence of greater anticipated business and a larger staff, the Company, for economic reasons, decided to relocate to College Park. The Company decided to relocate to former Trans-Air facilities in other cities. However, nowhere but in Atlanta did this result in the displacement of the Company's crew. What is demonstrably false is the Company's assertion of alleged factors relating to Atlanta, which led it to terminate all of the union adherents in the bargaining unit.

First, Atlanta was not as important in the overall picture as the Company now claims it to be. Hoffenberg claimed that Atlanta was Trans-Air's number one facility in terms of domestic profitability. However, his testimony in this regard was contradicted by a more knowledgeable witness. Company Assistant Treasurer Herbert Bramer testified that after careful and detailed study he concluded that Atlanta stood second or third in this regard, and that Trans-Air's Minneapolis facility

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it is impossible to answer this question on any generalized basis. Too many variables are involved. Relative profitability may depend on the freight forwarder itself, and the nature of its operations and personnel, its customers, the type of goods shipped, the volume of goods shipped, additional charges and services, type of container used, the arbitrary (charge to gateway city for international shipment), and other factors. In sum, relative profitability depends on subjective rather than objective factors; it depends on one's point of view. I accept the Company's premise that from its point of view, domestic shipping is relatively more profitable than international business. However, it is unlikely that the Company would, if acting from purely economic and nondiscriminatory motives, do anything to jeopardize its international business, particularly in view of its strength in that area. International shipping involves special paperwork and other factors which entail employee knowledge and experience. I agree with General Counsel's argument that if the Company were so motivated, that it is unlikely that it would intentionally sacrifice a crew which was knowledgeable and experienced both in international and domestic operations, in favor of a crew which not only was not familiar with the Company's operations, but also lacked knowledge and experience in international operations. The Company recognized this fact of life, and retained its own crews everywhere but in Atlanta.

was first in terms of domestic strength. Bramer was more knowledgeable than Hoffenberg when it came to economic matters, although he may not have been as well attuned as Hoffenberg concerning what it takes to win an unfair labor practice case. I find Bramer's testimony to be more reliable than the testimony of Hoffenberg, or the self-serving statistics presented in evidence through Hoffenberg, but which were allegedly obtained from Howard Schor, who was not presented as a witness. The Company sought to retain Trans-Air's Minneapolis district manager, and he like others, considered going with a competitor, although he ultimately stayed with the Company. However, the Company did not seek or obtain his services at the expense of losing its own crew. In Minneapolis, the Company retained its entire employee complement (as elsewhere), and hired only a few of the Trans-Air personnel.

Second, the key to retention or acquisition of Trans-Air's southeastern business, to the extent that such retention depended on personnel below the level of top management, was not Robert Heney and his crew. Rather, the key was Trans-Air's sales personnel, and in particular, Trans-Air National Sales Manager Joe Kelly, who was based in Atlanta. Hoffenberg in his testimony admitted that he knew that Kelly was best suited to aid the Company in this regard, and that Kelly was responsible for much of Trans-Air's southeastern business. In this regard, the Company failed dismally. Kelly went with a competitor, together with a southeastern salesman, and took some of Trans-Air's business with him. Another key sales figure, Trans-Air National Accounts Sales Manager Jim Cherry (also based in Atlanta), remained with Arrow-Lifschultz until March, when he left (without going to the Company). Although Herbert Bremer had a low regard for the Company's sales staff, the Company retained that staff, while terminating only the unit personnel.

In contrast, the evidence fails to indicate that Heney obtained or had any special influence with Trans-Air's customers. On the contrary, the evidence indicates that Heney was at best a mediocre and at worst an incompetent manager, and that the Company knew this, or could have found this out (assuming

that it made a difference to the Company). Heney padded his staff with an assortment of relatives accumulated from his marriages. He created an excess of supervisory positions (for his relatives among others) to the point where there were almost as many bosses as workers. Within a short time after the acquisition, Hoffenberg directed Heney to reduce the number of supervisors. As a result, the classifications of Carl Herrington and Susan Doyle were downgraded. Heney kept on driver-dockman Ken Ley, an incompetent employee, long after Heney's supervisors, Tony Chaffin, Sue Doyle and Dewitt Floyd, had recommended his termination or adversely evaluated him. Heney admitted that in March or April, after consultation with Hoffenberg and southeast Regional Manager Glen Maddox, he terminated Ley because of gross carelessness.[34] Needless to say, Ley was not replaced by any of the alleged discriminatees. Ley is a graphic illustration of the kind of selection process which took place in Atlanta. Needing a driver-dockman, the Company hired Ley, who was known to be unqualified, but it terminated John McCollum, who had been appraised by Pshirer as a "hard working, conscientious employee" only a few months earlier. Heney, by his own admission, cost Trans-Air some $4000 per month by relying exclusively on Trans-Air's drivers and equipment, rather than utilizing owner-operators. Upon the acquisition, the Company promptly instituted its existing practice of using owner-operators. Heney also had a reputation of sending exaggerated reports of the amounts of freight moved by his facility, which earned him the well-known nickname of "Mr. Billion-Trillion," a name known even to Frank O'Rorke. In light of this fact, if

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34 Upon the acquisition, the Company's Atlanta facility was placed in the Company's newly constituted southeast region, which included Atlanta and Charlotte. Instead of reporting to Pshirer in Pittsburgh (as had O'Rorke), Heney reported to Maddox in Charlotte. Hoffenberg continued to direct labor relations, and as indicated by Heney's testimony, he remained heavily involved in personnel matters in Atlanta. The Company had originally contemplated a larger southeast region, headed by Joe Kelly. However, when Kelly opted for a competitor, the Company scaled down its original plan.

no other, I find it incredible, as the Company suggests, that Company President Joseph Berg would have accepted, at face value, Heney's alleged claim that Atlanta was successful because it had trained personnel and a good sales force. Indeed, within a few months after the acquisition the Company sent Heney out into the field, to spend at least 2 days each week drumming up business. Increasingly, the everyday responsibilities of running the facility devolved upon none other than John Moore, who, the Company suggests, was busy stealing documents from the Company after Nella Dunn was discharged.

What Heney did have was a reputation as a union buster, and this was just what the Company wanted. In light of Heney's modest qualifications, the Company needed to offer Heney nothing more than a pay raise (which it promised him), in order to insure that it would obtain his services. In fact, the record is devoid of evidence that retention of the entire Trans-Air crew was necessary in order to insure Heney's vitally needed presence. Heney testified that he did not make retention of the entire group a condition of his going with the Company, and Hoffenberg testified that he never gave Heney a commitment that all of his personnel would have jobs. Heney testified that in the past, through previous mergers or acquisitions, he had assured the employees that if they stuck with him, he would keep them together as a group. However, Michael Turner testified that he had no recollection of Heney making such a promise. Heney's corroboration in this matter came from his relatives by marriage, Tony Chaffin and Carl Herrington. It may be that Heney made promises of some sort to his wife, or wives, but this is not the stuff of which hard-headed business decisions are made.

The reasons offered by the Company for its selective retention of Kathy Lee and Susan Sinclair and the manner in which it offered employment to John Moore, are also demonstrably pretextual. Lee had little going for her other than her outspoken opposition to the Union and her willingness to report to the Company on the lawful activities of her fellow employees. Lee lacked a principal qualification for her position as customer service agent, namely, tact in dealing with people. Both

Station Manager Mike Floyd and John Moore, whose leadership abilities are recognized by the Company, had a low opinion of her performance. Floyd testified that he complained several times to O'Rorke about Lee. Floyd told John Ashmore that Lee was not capable of doing her job, and that if he could have his way he would terminate her, but that O'Rorke told him not to mess with Lee. O'Rorke, in his testimony, suggested that all of this criticism simply relected male resentment of an employee who could not be counted on to share in heavy physical work when needed. However, Sue Denison shared the views of her male counterparts. Denison testified that Lee was "vulgar mouthed, very loud, rude."

Susan Sinclair was Nella Dunn's replacement, and therefore reliable from the Company's point of view. Although Hoffenberg and O'Rorke knew that Dunn had been discharged because of suspected union activity (or rather, for this reason), the Company never considered her for the secretarial position which was allegedly specially needed at College Park. Indeed, the Company's intentional failure to consider Dunn is tantamount to a second decision to dispense with her services, and is a principal factor linking Case No. 10-CA-12941 with Case No. 13436.

The Company's handling of John Moore contrasted sharply with its handling of a similar situation involving Moore less than a year earlier. In early 1977, prior to the Union's organizational campaign, the Company wanted to promote Moore to international supervisor. Moore did not want the position, feeling that supervisory personnel did not enjoy much job security at the Company. The Company was most accommodating. Moore was given a substantial raise and increased responsibilities, but was not required to accept a supervisory position. However, after June, 1977 the situation had changed. Moore was an "ardent, self-professed union supporter", and therefore had to be kept out of a potential or actual bargaining unit at all costs, even if the Company had to suffer the loss of his ability and expertise.

In sum, the Company, and specifically Martin Hoffenberg, saw in the Trans-Air acquisition a golden opportunity to

destroy the bargaining unit which had come into existence in Atlanta. O'Rorke's statements to Melanders, and Hoffenberg's internal memoranda make clear that from the beginning the Company intended to retain only Lee and Sinclair, plus the supervisory and sales personnel. Moore was later added, only out of desperate need for his services, but only if he could be kept out of the bargaining unit. I find that the Company terminated Ashmore, Rozier, Shepherd, McCollum and Moore because of their adherence to the Union, and in order to destroy the Union-represented bargaining unit, and thereby violated Section 8(a)(1) and (3) of the Act.[35]

6. Alleged violations of Section 8(a)(1) after the acquisition

(a) *Threats*

Sue Denison testified that during the first week in March, Frank O'Rorke asked her if she was quitting her job. (Denison had previously told Bob Heney that she was unhappy in customer service, and wanted a secretarial job). Denison testified that during their conversation, O'Rorke said that "legally Heney could not hire anyone until the problem with the Union was over with." At this point Denison questioned why the Company had hired one Greta Newsome to do part-time work. O'Rorke, in his testimony, denied that he ever said that there would be no hiring until employees ceased their union activities. As between Denison and O'Rorke, I find Denison to be the more credible witness. I credit Denison. In fact there was no legal impediment which would preclude the Company from hiring new employees, beyond the Company's outstanding and continuing legal obligation to reinstate the discriminatees. It is evident that O'Rorke was simply attempting to intimidate the newly hired Trans-Air employees in order to discourage them

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35 As the Company arrived at its decision to terminate the discriminatees well before the January 25 hearing, I find that their prospective (although not actual) testimony at that hearing was not a decisive factor in their terminations. Therefore, I am recommending that the allegation that the Company further violated Section 8(a)(4) of the Act, be dismissed.

from supporting the Union. I find that the Company, by O'Rorke threatened that there would be no hiring so long as the Union claimed to represent employees of Air Express, and thereby violated Section 8(a)(1) of the Act.

(b) The Region's Investigation

As indicated, the charges in Case No. 13436 were filed on February 13 and 14. Sue Denison testified that about March 1 (while the charges were under investigation), Frank O'Rorke summoned all of the employees present, including Denison, to a meeting. According to Denison, O'Rorke told the assembled employees that one of "my" drivers had been approached by a Board agent. O'Rorke did not indicate that the driver was angry about this. However, O'Rorke asserted that he considered this to be an invasion of privacy, and that he was "here to advise you that you don't have to ask any questions or talk to anyone." O'Rorke added that he would hold another meeting with the night shift employees, and that he did not want any of his employees "harassed." O'Rorke further stated that the Company would advise the employees of their legal rights if they wanted it. Denison testified that O'Rorke did not say that it was up to the employees as to whether they should talk to the Board agent.

O'Rorke testified that on March 7, owner-operator John Soublis came to him all excited. According to O'Rorke, Soublis complained that the Company gave the Board his name and address. O'Rorke testified that he told Soublis that this was not true, and that he (O'Rorke) after consulting with Company counsel, convened the meeting of employees. Soublis was not called to testify, although he was still driving for the Company at the time of this hearing and was therefore presumably available as a witness. O'Rorke first testified that Mike Floyd was present at this conversation, then testified that he and Soublis were alone, and thereafter testified that Floyd was nearby. Floyd, although a Company witness, was not questioned about the alleged conversation.

O'Rorke further testified that he told the assembled employees that the Company was not giving their names and addresses

to government officials, that "some" employees had been contacted, and that it was up to them to talk to the government agent or instead, to seek advice from the Company or Company counsel (which he offered to furnish). O'Rorke subsequently contradicted himself. He testified that he told the employees that "an" employee (meaning owner-operator Soublis) had been contacted. O'Rorke further testified that no one other than Soublis complained to him prior to the meeting, but that sometime after the meeting employee David Coker complained to O'Rorke that the Board's field examiner had contacted him and that he did not want to get involved. According to O'Rorke he answered that the Company did not give out any names.[36] O'Rorke was further contradicated by employee Paul Norton, who was presented as a company witness. Coker testified that he was present at the meeting of employees. However, despite leading questions by Company counsel, he testified that he could not recall O'Rorke saying anything about names and addresses. Norton testified, in sum, that O'Rorke told the assembled employees that an employee complained that he was contacted at night by the Board, that the employees did not have to answer questions without counsel, that it was up to them and that the Company would provide counsel to those who wanted it. Although David Coker was presented as a company witness, the Company conspicuously failed to question him about his alleged complaint to O'Rorke, and consequently Coker did not testify about that matter.

The Company's conspicuous failure to produce John Soublis as a witness or to present testimony by Mike Floyd and David Coker concerning the alleged complaints to O'Rorke, warrants the inference, and I so find that, had their testimony been presented it would have been adverse to the Company's interests. See, *Martin Luther King, Sr. Nursing Center,* 231

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36 O'Rorke further testified that he told Floyd to speak to night shift employees, but that Floyd never did, although O'Rorke personally spoke to one of them (David Bowlden).

NLRB 15 (1977), at n.1.[37] I do not credit O'Rorke's uncorroborated, self-serving assertions that employees complained to him about the Board's investigation, and that such complaints caused him to call a meeting of the employees. Rather, the inference is warranted, and I so find, that upon learning that the Board's Field Examiner was talking to employees, O'Rorke, acting upon the advice of Daniel Thompson, engaged in a calculated attempt to discourage and intimidate the employees from cooperating in the Board's investigation. In view of the contradictory testimony presented by the Company concerning the meeting, I credit Denison who, as heretofore indicated, I have found to be a substantially credible witness. O'Rorke's speech was coercive. O'Rorke made clear that he was advising the employees not to cooperate in the investigation. Indeed, his speech, flavored with references to "invasion of privacy" and harassment of employees, constituted a diatribe against the Board's investigation. His speech occurred against a background of unfair labor practices and was unaccompanied by any assurance that there would be no reprisal against employees who cooperated in the investigation. I find that O'Rorke's statements, including the offer to furnish legal advice, constituted unlawful interference with the employees' right of free access to the Board, and an unlawful attempt to obstruct the Board's processes. *Bryant Chucking Grinder Company* v. *N.L.R.B.*, 389 F.2d 565, 567 (C.A. 2, 1967), cert. denied, 392 U.S. 908; see also, *Florida Steel Corporation*, 233 NLRB No. 74 (1972), at n.1; *Certain-Teed Products Corporation*, 147 NLRB 1517, 1519-21 (1964). Compare the "temperate" language utilized by the employer in *N.L.R.B.* v. *J. W. Mortell Co.*, 440 F.2d 445, 459 (1971). I find, as alleged in the complaint, that the Company violated

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37 In view of the Company's failure to present testimony by persons who allegedly made the complaints or who were allegedly present when they were made, I do not consider the testimony of Martin Hoffenberg about what O'Rorke said at the March 7 negotiating session, to be material corroborative evidence. Rather, Hoffenberg's testimony amounts to little more than hearsay on hearsay.

Section 8(a)(1) of the Act by soliciting its employees to refuse to give testimony to Board agents. As the credible evidence indicates that O'Rorke did not receive any employee complaints about the investigation, but instead sought to intimidate the employees and thereby impede the investigation, I further find that by telling his employees that one of "my" drivers had been approached by a Board agent, and angrily denouncing such contact, O'Rorke sought to further intimidate the employees by creating the impression of surveillance of their union activities. For this additional reason, the Company further violated Section 8(a)(1), as alleged in the complaint.

D. *The Alleged Unlawful Withdrawal of Recognition and Refusal to Bargain In Good Faith With the Union*

1. Contentions of the Parties

General Counsel contends that at all times material the Union was and still is the collective-bargaining representative of the Company's dockmen, drivers and agents at its Atlanta facility (excluding sales personnel, confidential employees, professional employees, guards and supervisors as defined in the Act), whether that facility was located at East Point, as it was until February 10, or at College Park as it has been since that date. General Counsel contends that the Union is entitled to recognition at the College Park location either by virtue of the Board certification (which refers to the East Point location), or by application of the principles of *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 613-615 (1969). The Company in the present reopened proceeding, belatedly concedes that the Union was the certified collective-bargaining representative of its East Point employees.[38] However, the Company denies that the Union represents its employees at College Park. The

38 At the January 25 hearing, Company Consultant Thompson argued that the Board had not issued a certification. However, as a witness in the reopened hearing, Thompson conceded that at a meeting between the parties on January 4, both the Union attorney and the Company attorney advised him that the Board had in fact certified the Union.

Company further argues that in view of the pending acquisition of Trans-Air, the Company was obligated to bargain with the Union only concerning the effect of the closing of its East Point facility upon the East Point unit employees, and that it fulfilled this obligation. General Counsel contends that the Company failed to meet even this obligation. General Counsel submits that the Company unlawfully failed to comply with the Union's requests for a copy of the acquisition agreement with Trans-Air, and for a list of the names, job classifications and dates of hire of the Trans-Air employees at College Park, and generally failed to bargain in good faith with the Union. General Counsel further contends that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the Union as the representative of its employees at College Park on and after February 10.

2. Meetings and Correspondence Between the Company and the Union

During the period from November 3, 1977 through May 8, 1978, there was an exchange of correspondence between Company Counsel Jacobson and Union Counsel Frederick McLam, and the parties met on three occasions: January 4, February 9 and March 7. The operative facts concerning these contacts are substantially undisputed. On November 3, Attorney Jacobson sent a letter to the Union in which he noted the pending litigation concerning the certification. Jacobson informed the Union that the Company had entered into a purchase agreement with Trans-Air, and that the Company was considering closing its East Point facility and relocating in a larger facility at the Trans-Air location. Jacobson stated that without prejudice to his client's position, the Company was offering to negotiate with the Union concerning impact of the probable closing on the East Point employees. By letter of November 18 from Attorney McLam, the Union accepted the Company's offer to meet. A meeting was set for December 20, but rescheduled to January 4 at the request of Company counsel. This was the only time that the Company requested a delay in

meeting with the Union, and I am satisfied on the basis of the record evidence that the Company was not dilatory in meeting with the Union.

The parties met in Atlanta on January 4. Jacobson acted as spokesman for the Company, and he was accompanied by Hoffenberg, Thompson, and O'Rorke. Attorney McLam acted as spokesman for the Union, and he was accompanied by Union secretary-treasurer Albert Johnson and Union business agent Fred Thomas. Jacobson offered to discuss the impact of the closing of the East Point terminal. Jacobson proposed that the Company would lay off all of the unit employees, and hire Trans-Air employees to perform their work. In fact, as heretofore found, the Company had already decided to retain Kathy Lee, and never seriously considered doing otherwise. McLam asked how many non-supervisory employees there were at Trans-Air. O'Rorke answered that there were about 15, excluding sales personnel. As will be discussed, the figure was exaggerated and misleading. Hoffenberg stated that the Company anticipated that the work previously done by 21 employees (i.e. the separate Company and Trans-Air personnel) could be done by 15.

After receiving the Company's proposal, the Union representatives caucused, and emerged with a proposal to dovetail the seniority of the Company and Trans-Air employees; i.e. to staff the Company's College Park facility by laying off, to the extent necessary, employees of the firms from a single list, in inverse order of their seniority. Jacobson said that the Company would take the Union's proposal under advisement, but that the Company wanted to retain the Trans-Air staff intact, and dovetailing would be disruptive. The practical effect of the Union's proposal would have been retention of most or all of the Company's employees, including the Union activists, because of their greater job seniority. The Company know this. Hoffenberg was in possession of a dovetailed seniority list, having obtained the pertinent Trans-Air personnel information from Bob Heney, who had exchanged personnel information with his then counterpart, Frank O'Rorke. (The Company did not bring such a list to any of the negotiating sessions). There is no direct evidence that the Union had information concern-

ing the names, job categories or dates of hire of the Trans-Air personnel. However, the Union probably suspected that seniority would work to its advantage, in view of the length of service of the union adherents (Rozier and Moore had worked for the Company since 1963 and 1964 respectively), and the relatively short history of the Trans-Air operation in Atlanta. Indeed, Dan Thompson admitted that he and Jacobson anticipated that the Union would propose hiring by seniority.

McLam requested a seniority list of the East Point employees, and the Company promised to furnish one. The list was furnished by letter of January 17 from Jacobson to McLam. McLam also requested a copy of the purchase agreement between the Company and Trans-Air. Jacobson answered that the Company would take the request under advisement, but he offered to give the Union copies of publicly released announcements concerning the acquisition. There was no discussion of the reasons for the Union's request. Hoffenberg and Thompson testified, in sum that McLam said that if the Company was closing down the East Point facility, there would be no need to negotiate a contract. (Up to this point the Company had been contesting the certification, and consequently there had been no negotiations between the parties concerning a contract which would cover East Point or any other location). Thompson took written notes of the meeting, which purport to be a complete summary of the discussions, but his notes do not reflect that McLam made the alleged statement. However, Albert Johnson, who testified for General Counsel concerning the meetings, did not indicate that McLam did not make the alleged statement, and was not called as a rebuttal witness. Johnson did assert in his testimony that the Union's dovetailing proposal constituted an implicit demand for recognition at College Park. I credit Hoffenberg in this regard, and find that McLam made the statement attributed to him. McLam's statement was understandable, considering the time and context in which the meeting took place. If the Company were permanently closing the East Point facility, opening a new and different facility, terminating all of its employees for nondiscriminatory reasons, and staffing the new facility with a

different complement of employees, then the Union would have had no basis for demanding a contract for College Park. However, as of January 4 the Union had no way of knowing that the Company's representations were false. In particular, the Union had no knowledge of the arrangements between the Company and Trans-Air, and could not have known that the Company intended to discriminatorily terminate the Union adherents at East Point.

The parties agreed to meet again, and they next met on February 9. In the meantime, Jacobson sent a letter to McLam, dated January 13, in which, in sum, the Company rejected the Union's proposal to dovetail seniority, offered John Moore a supervisory position, offered "C. Herrington" a position because of that person's experience in customer service, and offered severance pay and health coverage for a period of time to the terminated employees. Jacobson enclosed a copy of a news release announcing the acquisition, and stated that he was checking on whether the purchase agreement was a public document which McLam could review. The "C. Herrington" referred to in Jacobson's letter was Trans-Air's international supervisor. On January 17 Jacobson informed McLam that he meant to refer to Kathy Lee, and not Herrington. This was no compromise, as the Company intended all along to retain Lee because of her opposition to the Union. Lee was also lowest in seniority among the Company employees. By letter of January 23 to Jacobson, McLam requested the Company to negotiate a contract.

The parties met in Atlanta on February 9. Jacobson and Thompson were present for the Company, and Albert Johnson, Fred Thomas and employee Marlin Rozier were present for the Union. Hoffenberg was in Stamford, awaiting imminent CAB approval of the acquisition, and O'Rorke was stranded in Boston because of a snowstorm. The parties maintained their previously stated positions concerning the impact of acquisition. The Union submitted a proposed contract, and the parties proceeded to discuss its provisions. The Company agreed to a recognition clause which referred to the East Point location, but declined to agree that the contract

would be binding on the Company's "successors." The parties next took up Article 2 of the proposed contract, captioned "Union security and check-off," and agreed on the language of a no-discrimination clause. Their discussions were interrupted by a telephone call to the Company representatives, who were informed that CAB had approved the acquisition of Trans-Air. At this point, at the Union's suggestion, the meeting was terminated, and the parties agreed to meet again on March 1. That meeting was later reset for March 7, because of a death in Johnson's family.

By mailgram dated February 10, Jacobson notified the Union that the Company had closed its East Point facility and commenced "substantially expanded operations" at the former Trans-Air location. Jacogson proposed to negotiate the impact of the closing on the unit employees at the meeting then scheduled for March 1. By letter dated February 11, Jacobson elaborated on his mailgram. Jacobson asserted that the Company would continue to recognize the Union as representative of the employees who worked at East Point, but did not recognize the Union for the new location, because the new location was not covered by the certification, and was substantially larger and different from East Point. Jacobson adhered to the proposals which were set forth in his previous correspondence.

The parties' next and final meeting was in Atlanta on March 7. By this time the Union had filed its charges in Case No. 10-CA-13436, and they were being investigated by the Board's Regional Office. Present at the meeting were Jacobson, Hoffenberg and O'Rorke for the Company, and Johnson, Thomas and Rozier for the Union. The Union adhered to its previously stated proposal, and the Company adhered to its position, but with modification in the case of John Moore. The Company extended until March 10, the time within which Moore could accept the position as international supervisor.[39] The Company

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39 As indicated, Moore accepted the offer on March 10. In the meantime, the Company hired one Bob Warren, and he and Carl Herrington shared the responsibilities of an international supervisor. After Moore returned to work for the Company, the Company transferred Warren to Charlotte.

also proposed severance pay and temporary continuation of health benefits for Moore (along with the other terminated employees) even if he declined the offer of a supervisory position. Jacobson further stated that the Company would favorably consider taking Moore as a rank-and-file employee if the Union would make such a proposal.[40] The Union did not make such a proposal. The Company gave the Union a copy of the CAB order approving the merger (which the Union had not requested), but failed to furnish a copy of the acquisition agreement which it had requested. The Union requested that the Company consider using the terminated employees before hiring casual help. Jacobson responded that the Company would favorably consider this request if the Union agreed to the Company's position. The Union requested a Trans-Air seniority list, and Jacobson said that he would take the request under advisement. Albert Johnson said that he would contact Jacobson for another meeting. He did not, and there were no further meetings.

The remaining contacts between the parties were by correspondence emanating from their attorneys. By letter dated March 15 to Jacobson, McLam renewed his request for a copy of the acquisition agreement. By letter dated March 22 to Albert Johnson, Jacobson requested the Union to respond to the modifications of its position which were stated at the March 7 meeting. With respect to Moore, Jacobson stated that the Company could revise its offer downward if supervisory status was an impediment to Moore's acceptance of the position. By this time, Moore had already returned to the Company as a supervisor. In any event, I agree with the Union that at no time did the Company offer to take back Moore as a rank-and-file employee. Rather, at the March 7 meeting and in Jacobson's letter, the Company simply invited the Union to make such a proposal. As the Union was proposing dovetailed seniority, and Moore was not even the senior employee, the Company could then reasonably have viewed a Union proposal

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40 This finding is based on the credited testimony of Hoffenberg. Jacobson essentially restated this position in a subsequent letter.

concerning Moore as an abandonment of the Union's position, and possibly, an abandonment of any claim that other dischargees be reinstated. In these circumstances, it is understandable that the Union did not acquiesce in the Company's suggestion.

Jacobson refused to furnish the Union with a copy of the acquisition agreement, saying that relevancy was not shown, and that the CAB decision, which he had given to the Union on March 7, set forth the arrangements between the Company and Trans-Air in detail. However, Jacobson enclosed a document which purported to be a seniority list of Trans-Air employees, with names deleted, and employees identified only by a code letter, date of hire and classification. Jacobson claimed that the Union had not shown relevance of actual names. The list is here reprinted in full. In addition I have inserted in brackets, my findings, based on the record evidence, of the probable identities of the personnel referred to in Jacobson's list (No company witness ever specifically identified the employees referred to in that list):

RANK AND FILE SENIORITY LIST FOR TRANS-AIR FREIGHT SYSTEMS, INC. IMMEDIATELY PRIOR TO EFFECTIVE DATE OF AEI ACQUISITION

Date of Hire	*Code Letter*	*Classification*
6/19/72	Employee A [Carl Herrington]	International Agent
7/19/73	Employee B [Tony Chaffin]	Domestic Operations
9/24/73	Employee C [Sue Doyle]	Night Shift Supervisor
1/17/75	Employee D [Sue Denison]	Customer Service Representative
2/4/736[sic]	Employee E [DeWitt Floyd]	Agent
9/8/76	Employee F [David Coker]	Driver

Date of Hire	*Code Letter*	*Classification*
4/26/77	Employee G [Mike Turner and	Driver
6/16/77	Employee H Ken Ley]	Driver
7/14/77	Employee I [Pam Chidester] (Maternity leave)	Clerical
8/1/77	Employee J [Terry Bowlden]	International Agent

In addition, 2 Trans-Air drivers resigned their positions and became owner-operators for AEI effective on about February 10, 1978. [John Soublis and Alan Carter].

This was the only information which the Company furnished in response to the Union's request for a seniority list of Trans-Air employees. On the basis of the record in this case, it is evident that the list was inaccurate in several respects, although the Union had no way of knowing this at the time it received Jacobson's letter. For example the list does not account for Paul Norton, who began his employment on April 21, 1976. Apart from the question of supervisory status under the Act, Herrington, Chaffin and Floyd in addition to Doyle, had the title of supervisor or manager. In view of the recent history of acquisitions and mergers which preceeded the Trans-Air facility at College Park, some of the alleged dates of hire were at least open to question.

By letters of April 6 and May 5, 1978 to Jacobson, Union Attorney McLam stated that the Union had not waived its right to represent the employees at College Park, and requested negotiations for a contract covering College Park and the former East Point employees. By letters of April 12 and May 8, 1978 Jacobson in sum rejected the Union's demand. Jacobson stated that the Company would discuss the impact of the closing, but would not recognize the Union for College Park,

and that the Union had previously said that it did not represent the employees at College Park. These were the last communications between the parties.

Reinstatement of the discriminatees was not a bargainable issue. As the Company violated Section 8(a)(1) and (3) of the Act by terminating them, the Company had a continuing obligation to offer them immediate and full reinstatement to their former positions. The Company's failure to do so constituted a continuing violation of Section 8(a)(1) and (3). Therefore, it is unnecessary to determine whether the Company further violated Section 8(a)(5) of the Act by failing and refusing to retain them, and thereafter failing and refusing to offer them reinstatement through the Union, their certified bargaining representative. As the discriminatees were terminated in violation of Section 8(a)(1) and (3), it is also unnecessary to consider General Counsel's alternative argument that they would be entitled to reinstatement and backpay as a remedy for the Company's alleged refusal to bargain in good faith over the effects of the transfer of its facility from East Point to College Park.

Putting aside the Company's obligation to reinstate the discriminatees, and putting aside for the moment, the question of whether the Union represented the employees at College Park on and after February 10, the evidence indicates that the Company, on and after January 4, failed and refused to bargain in good faith over the effects of the transfer of its facility from East Point. From beginning to end, the Company misrepresented its position and the pertinent facts. The Company proposed to terminate all of the East Point employees, when in fact it intended all along to retain Kathy Lee. The Company misrepresented the number of Trans-Air employees, and belatedly furnished false and incomplete information concerning the names, classifications and dates of hire of the former Trans-Air employees. The Company falsely represented to the Union that it was closing its East Point facility and opening a new one, when in fact it was simply moving its existing facility from one location to another.

The acquisition agreement between the Company and Trans-Air lay at the heart of the matters under discussion between the Company and the Union, which matters even the Company concedes it was obligated to negotiate. Relevancy was self-evident and did not have to be spelled out in *haec verba* by the Union. The provisions of the agreement were actually or potentially relevant to the nature of the changes which would take place upon acquisition, to whether or not the Company and Trans-Air were co-employers, to whether College Park would be a continuation of the East Point facility, and to what if any obligations the Company or Trans-Air bore or had undertaken toward the personnel of both employers, e.g. respecting job seniority or benefits. Neither press releases nor the CAB order allowing the acquisition (technically, an order exempting the acquisition from the requirements of Section 408(a)(5) of the Federal Aviation Act of 1958, as amended) were an adequate substitute. These documents merely summarized the terms of the acquisition agreement, and the CAB order was not even available to the Union until after the acquisition took place. Indeed, it is questionable whether the Union has ever seen the complete acquisition agreement. Although a document purporting to be the agreement was entered in evidence at my direction as Judge's Exhibit 2, the document contains references to exhibits "annexed hereto," but which are not so annexed. Martin Hoffenberg testified that Judge's exhibit 1 is a complete copy of the acquisition agreement as it existed on October 19, and that the exhibits in question were prepared later and were included in the closing binder. For the purpose of a remedial order, there is no assurance that the Union has in fact received a complete copy of the acquisition agreement as it existed on January 4, when the Union made its demand. The acquisition agreement was relevant to a mandatory subject of bargaining and was not privileged from disclosure to the Union by any rule of law; indeed the Company never invoked any asserted privilege. Rather, the Company simply rested on its erroneous position that the Union failed to demonstrate relevancy. Therefore the Company, on and after January 4, violated Section 8(a)(5) and

(1) of the Act by failing and refusing to promptly furnish the Union with a copy of the acquisition agreement. As there is no assurance that the Company has ever furnished the Union with a true and complete copy of the agreement, an order directing the Company to do so is warranted.

I further find that as part of its unlawful failure and refusal to bargain in good faith with the Union, the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with an accurate and complete list of the names, classifications and dates of hire of the Trans-Air employees. The Company did not dispute that the classifications and dates of hire were relevant to the matters under discussion with the Union, i.e. impact of closing of the Trans-Air facility. However, without the names, the Union had no way of checking on the accuracy of the information presented by Attorney Jacobson. As indicated, the information furnished was in fact inaccurate. In view of the Company's demonstrated tendency to misrepresent job classifications and functions in order to weaken the Union's position, the inference is warranted that the Company intentionally misrepresented the classifications of Herrington, Chaffin and DeWitt Floyd. Moreover, the Company had no legitimate reason to conceal the identity of the Trans-Air employees. Rather, the Company's overall pattern of conduct suggests that it was primarily concerned with inhibiting contact between the Union and those employees. Therefore, the Union was and is entitled to the requested information. Of course, if the Union was the collective-bargaining representative at College Park on and after February 10, then there could be no question that the Union would be entitled to the names of the employees at that facility.

3. Alleged status of the Union as Bargaining Representative at College Park.

I find that the Union made a timely demand for recognition at the College Park facility, and did not knowingly waive its rights in this regard. When the Union learned, or had reasonable cause to believe, that the Company transferred its existing

facility from East Point to College Park and discriminatorily discharged the Union adherents, the Union invoked its representational rights. Prior to February 10, the Union did not know these facts, and therefore could not have knowingly waived its rights. Moreover, if the Board certification were applicable to College Park, no demand would have been necessary because the Union would have continued as bargaining representative by virtue of the certification itself.

There remains the question of whether the Union was the collective-bargaining representative at College Park on and after February 10, either by virtue of the certification, or pursuant to the doctrine of *N.L.R.B.* v. *Gissel Packing Co., supra.* Preliminary to answering this question, it is necessary (1) to determine the composition of an appropriate unit at College Park, as defined by the language of the certification which refers to East Point, and (2) to identify the personnel who were actually working at College Park on February 10. The present case involves employees who were discriminatorily terminated. Therefore, consideration of unit composition begins with the rule that discriminatees are "by operation of law" the employees of the employer, and therefore deemed to be included in the bargaining unit. *Houston Distribution Services Inc.*, 227 NLRB 960, 968 (1977), enf'd 573 F. 2d. 260, 266-267 (C.A. 5, 1978); See also, *N.L.R.B.* v. *Fabsteel Company*, __ F.2d __, 100 LRRM 2349, 2354 (C.A. 5, 1979). As heretofore found, but for the discrimination against them the Company would have retained all of the discriminatees. Corollary to this rule is the further principle that in determining unit composition for the purpose of determining a union's representative status, employees who were hired to replace the discriminatees, are not counted. See *Fabsteel, supra,* [41]

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41 *Fabsteel,* unlike the present case, involved unfair labor practice strikers and their replacements. However, the policy enunciated in *Fabsteel* is equally applicable to discriminatorily discharged employees and their replacements. If the evidence indicates that certain employees probably would not have been hired but for the Company's unlawful conduct, then counting such employees as indicative of the Union's lack of majority status would be tantamount to rewarding the Company for such conduct. Compare,

The certified unit does not exclude office clericals, but does exclude confidential employees. At the time of her discharge, Nella Ree Dunn was a secretary but was not a confidential employee. However, Dunn was excluded from the unit, by stipulation of the Company and the Union, on the basis of the Company's false and discriminatorily motivated representation that she was O'Rorke's confidential secretary. In the absence of any violation of law or policy, the Board customarily finds stipulated or agreed upon units appropriate. *International Ladies Garment Workers' Union (Bernhard-Altmann Texas Corporation)*, 122 NLRB 1289, 1291, n. 4 (1959), aff'd 366 U.S. 731, 735 (1961). However, the Board has broad discretion, in furtherance of its authority to protect the self-determination rights of employees, to modify or set aside consent agreements in representation cases. See, *Uyeda* v. *Brooks*, 62 LRRM 2831, 2834 (C.A. 6, 1966); see also, *Mark J. Gerry d/b/a Dove Manufacturing Company*, 128 NLRB 778 (1960). Exclusion of Dunn from the bargaining unit would unjustly deprive Dunn of her self-determination rights, and therefore would contravene the policies of the Act. As Dunn was entitled to be included in the unit by reason of her job, and was discriminatorily discharged, I find that by operation of law, she was an employee in the certified unit, and was an employee in the unit at College Park on and after February 10. As Susan Sinclair was Dunn's replacement, she cannot be counted in determining the union's representative status. I further find that at no time material did either Dunn or Sinclair perform work which would warrant their being classified as confidential employees under Board law. Sinclair continued to perform substantially the same work as Dunn. She performed accounting and secretarial work (basically accounting, according to Heney), and also did billing and customer service type work. On and after February 10 she performed most of her secretarial work for Heney, and also performed some secretarial work

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N.L.R.B. v. *Frick Company*, 423 F. 2d 1327, 1334 (C.A. 3, 1970), cited with approval in *Fabsteel, supra*, 100 LRRM at 2354; see also, *J. R. Sousa & Sons*, 210 NLRB 982 (1974).

for O'Rorke. Under Board law, "confidential employees" are "persons who assist and act in a confidential capacity to persons who formulate, determine *and* effectuate management policies in the field of labor relations" [emphasis in original]. The *B.F. Goodrich Company*, 115 NLRB 722, 724-725 (1956). Mere access to confidential data does not qualify one as a confidential employee. *Ohio State Legal Services Association*, 239 NLRB No. 71 (1978), sl. op. at 19. Within the Company's organizational structure, Martin Hoffenberg formulated and determined the Company's labor relations policies. Frank O'Rorke and his successor Bob Heney were simply district managers who carried out that policy. Moreover, neither Dunn nor Sinclair acted in a confidential capacity to the district manager. They typed and wrote letters for the district manager, and opened his mail, thereby having access to material which might be considered confidential (principally customer information). However, this did not qualify them as confidential employees under Board law.

The remaining discriminatees (Ashmore, Rozier, Shepherd, McCollum and Moore), were by operation of law employees of the Company at College Park on and after February 10, and employees in the unit (as they were prior to February 10). But for the discrimination against him, Moore would have remained a nonsupervisory employee (as he requested) and therefore by operation of law he stood in the same position as the other discriminatees.

As of February 10, Robert Heney was district manager at College Park, and Mike Floyd was station manager, as he had been at East Point. Both were and are supervisors within the meaning of the Act, and therefore outside of the unit. Frank O'Rorke, who became Regional Sales Manager, also continued to occupy a supervisory position. Kathy Lee was the only East Point unit employee still at work. But for the Company's discriminatory conduct, the inference is warranted that the Company would have retained all of its personnel, as it did elsewhere. Therefore, Lee continued to be in the unit.

The Company also hired the following former Trans-Air personnel, who continued to perform nonsales work at College

Park on and after February 10: Tony Chaffin, Susan Doyle, DeWitt Floyd, Carl Herrington, Susan Denison, Terry Bowlden, David Coker, Ken Ley, Michael Turner and Paul Norton. The first four each had the title of supervisor or manager. Whether they were supervisors within the meaning of the Act will be discussed, *infra*. Heney, in his testimony, admitted that with the exception of the last named six employees, all of the former Trans-Air personnel were either supervisory or sales personnel. Alan Carter and John Soublis, who were employed as drivers for Trans-Air, resigned their jobs on February 9. The next day they became owner-operators, performing services for the Company. Oliver Hall, who had been an owner-operator prior to February 10, continued to perform delivery and dock services for the Company in that capacity. Hall employed several helpers, including John McCollum. Neither General Counsel nor the Company contends that the owner-operators of their helpers were or are employees of the Company. Therefore it must be presumed that the owner-operators were what they purported to be; namely, independent contractors. Consequently they and their helpers were outside of the unit. Other personnel identified as working at College Park on and after February 10 were either supervisory or sales personnel, or employees of Arrow-Lifschultz (which temporarily continued its operations at East Point after February 9), or fell into more than one of these categories. Susan Ward, a former employee of Trans-Air, was sales manager. Marilyn Francis, who remained with the Company, was a sales person who had always been outside of the bargaining unit. Ann Burgess was secretary to Jim Cherry, and both were employed by Arrow-Lifschultz on and after February 10. Secretary Betty Webster and driver Charlie Smith, whose names appear on a list of College Park personnel prepared by Bob Heney as of December 6, were identified by Heney as employees of Arrow-Lifschultz.

Pamela Chidester was secretary to Trans-Air National Sales Manager Joe Kelly, who as indicated, never went with the Company. In December, 1977 she went on maternity leave. Heney's list indicates that one Chestene Massey was employed

by the Company on December 6, but his list does not refer to Chidester. Heney testified that Massey was hired as a temporary replacement for Chidester. As of February 9, Massey was no longer working for Trans-Air, and she never worked for the Company. On April 3, 1978, the Company hired Pam Chidester, and she thereafter performed secretarial, accounting and some customer service work. The Company contends that Chidester should be considered as being on maternity leave on and after February 10, and therefore would have to be included in any determination of a bargaining unit. I disagree. As of February 10, Chidester was out of a job. As previously found, the Company never agreed to retain Trans-Air's employees as its own employees, and was adamant in this regard. Former Trans-Air's employees did not become Company employees until they were actually hired by the Company. The evidence does not indicate that the Company gave any notice to Chidester prior to April 3, 1978, that she would be working for the Company. Therefore, Chidester cannot be considered as having been in the unit as of February 10, notwithstanding the Company's self-serving assertion in its personnel records (as of April 3, 1978) that Chidester was "returning from maternity leave."

General Counsel contends that day operations manager (or supervisor) Anthony Chaffin, night shift supervisor Susan Doyle, mid-shift (evening) supervisor DeWitt Floyd, and international supervisor Carl Herrington, were at all times material supervisors within the meaning of Section 2(11) of the Act, and therefore outside of any bargaining unit. The indicated titles were those used by Trans-Air and which the Company continued to use until sometime after February 10, when Martin Hoffenberg concluded that the station had too many supervisors. Regional Manager Glen Maddox then directed Bob Heney to downgrade Herrington and Doyle to the position of lead agent. The titles of supervisor or manager are indicative of the responsibilities of the four individuals in question, although not conclusive evidence in this regard. Supervisors and sales personnel were paid bi-weekly, whereas the other personnel were paid weekly. Supervisors were usually

salaried; however, at least some nonsupervisory personnel were also on salary, and Tony Chaffin, although a supervisor, received an hourly wage. When Frank O'Rorke came to speak to the Trans-Air personnel in January, 1978, he conducted one meeting for the supervisors and sales personnel, and a separate meeting for the rank-and-file personnel. Robert Heney testified that any "supervisor" could tell the employees on his or her shift what to do, and did, that the employees were expected to follow their instructions, and that if the employees did not they could receive anything from a warning to termination. Heney testified that the judgment as to what discipline should be imposed was normally up to him, but that Doyle could impose discipline because she was the only supervisor at the station during the night shift.

As an adverse witness for General Counsel, Robert Heney testified that Chaffin had authority to hire and fire employees, but never exercised that authority. Subsequently, as a Company witness, Heney backed away from this admission. Heney testified that Chaffin did not have authority to hire and fire employees, or to recommend discharge, and that although Chaffin made such recommendations, he (Heney) did not follow his advice. I find Heney's initial admissions to be a more reliable indication of the truth that his later testimony, which was given after Company counsel had an opportunity to appraise Heney of the significance of his testimony. Therefore, I do not credit Heney's later testimony, nor do I credit Chaffin's disclaimer of authority in his testimony. I find that Chaffin did in fact have authority to hire and fire employees. Employee David Coker, who was a company witness, testified that Chaffin was in charge of the facility during the day. Employee Michael Turner testified that Chaffin, like Heney, gave both verbal and typewritten instructions, the latter being posted on a bulletin board. Heney testified that Chaffin was in charge during the day, in his (Heney's) absence. In sum, Chaffin shouldered much of the responsibility which John Moore later assumed after his return to the Company. Heney testified that Chaffin did not schedule employees' shifts or transfer employees between jobs or shifts. However, Michael

Turner testified that Chaffin oversaw domestic operations during the day. Chaffin in his testimony, admitted that he would expedite freight shipments, dispatch and direct drivers, check that everything was all right, answer employee questions, see that maintenance work was done, and see that shipments were picked up and delivered. I find that Chaffin had authority to and did responsibly direct employees in their work, that his responsibilities involved the use of independent judgment, and that he had authority in the interest of the Company to hire and fire employees and to effectively recommend discipline, including discharge. I find that at all times material, Chaffin was and is a supervisor within the meaning of Section 2(11) of the Act, and therefore could not be included in an appropriate bargaining unit.

As an adverse witness for General Counsel, Robert Heney testified that Susan Doyle had authority to hire and fire employees. As a company witness Heney again backed down on his testimony. He testified that Doyle did not have the right to hire employees. However Heney admitted that Doyle had authority to recommend discharge, and to discharge employees on the night shift because there was no one else present at the facility with such authority. Heney testified that Doyle worked with three or four employees. Heney admitted that Doyle was responsible for seeing that employees performed their work. On the basis of Heney's testimony and the admissions contained therein concerning supervisors in general and Doyle in particular, I find that Doyle was a supervisor within the meaning of the Act as of February 10, and therefore could not be included in a bargaining unit. However, the Company contends with respect to Doyle and other personnel, that in considering the composition of a bargaining unit, I should take into consideration personnel changes which took place after February 10. I find this argument without merit. If the Union was the certified bargaining representative at College Park on February 10, then it enjoyed the benefit of a conclusive presumption of representative status after that date. Absent unusual circumstances, a labor organization is entitled to the benefit of a conclusive presumption of majority status for a

one-year period following its certification in a Board-conducted election. *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954). In the present case, the Union won an election on July 28, and was certified on December 14. Moreover, the one-year period has not even begun to run. The Company did not even recognize the Union at East Point until January 4. Thereafter the Company refused to bargain in good faith with the Union, and refused to recognize the Union as bargaining representative for College Park. Therefore, assuming that the Union was the certified representative at College Park on February 10, it never received the benefit of the conclusive presumption of majority status. No unusual circumstances occurred after February 10 which would operate to nullify the presumption. As will be discussed, the Company maintained substantially the same size employee complement which it had on that date. Some employees left (e.g. Denison and Lay), and others were hired (e.g. Chidester). Carl Herrington and Susan Doyle were reclassified from supervisor to lead agent, but these were not the kind of changes which overcome the presumption. *Ray Brooks, supra,* 348 U.S. at 98-99. Therefore, I find that all times material, Doyle was outside of an appropriate bargaining unit.

As an adverse witness for General Counsel, Robert Heney testified (after an overnight break) that DeWitt Floyd did not have the authority to hire and fire employees. Heney testified that Floyd had been a station manager for Trans-Air in another city, and transferred into Atlanta as station manager. However, in July 1977, after it became apparent that he could not handle a station as large as Atlanta, he was demoted to supervisor. Heney testified that at that time he lost his authority to hire and fire employees. The College Park facility had no station manager until Mike Floyd took over on February 10. DeWitt Floyd was mid-shift supervisor, and normally worked from 2 or 3 p.m. until midnight. Sometime after February 10 he was put in charge of the night shift. Heney testified that DeWitt Floyd had authority to direct the work of the employees with whom he worked. The mid-shift partially overlapped the day and night shifts. However, for much of the evening

DeWitt Floyd would normally have been the only supervisor at the facility. The inference is warranted that Floyd had the same authority on his shift that Chaffin had on the day shift and Doyle on the night shift. I find that DeWitt Floyd is and was at all times material a supervisor within the meaning of the Act.

Robert Heney testified that Carl Herrington did not have authority to hire or fire employees, or to recommend such action. Heney and Mike Turner testified that Herrington was international supervisor. However, his identity as a supervisor was not widely known. Sue Denison testified that she understood him to be an international agent. Trans-Air did not do much international shipping. In the afternoons, when most international work is done, Herrington worked with Terry Bowlden, who performed both international and domestic work. However, Herrington personally did most of the international work. Herrington's relationship to Bowlden was that of a more experienced employee to a less experienced employee. They both did the same work, and Herrington instructed Bowlden how to perform the work. Herrington was not able to take charge of the Company's international operations. After February 10 the Company brought in Bob Warren. Apparently in deference to Herrington's sensibilities, they nominally functioned as co-supervisors over Bowlden. After John Moore returned to the Company, Moore was put in charge of international operations, and Warren was transferred out of Atlanta. I find that Herrington was not a supervisor within the meaning of the Act. Herrington's job substantially consisted of unit work. The fact that he was Heney's stepson did not deprive him of a community of interest with his fellow employees. *Tops Club, Inc.*, 238 NLRB No. 130 (1978) sl. op. at 5. Therefore, Herrington cannot be excluded from an appropriate unit on these grounds.

In sum, I find that Chaffin, Doyle and DeWitt Floyd were supervisors within the meaning of the Act, and therefore outside of an appropriate bargaining unit. Trans-Air had an excessive number of supervisors, and on and after February 10 the Company also had a disproportionate ratio of supervisors to rank-and-file employees. However, that fact does not pre-

clude supervisory status under the Act, if in fact the statutory criteria are present. In the case of Chaffin, Doyle and Floyd, such criteria was present.

As of February 10, the Company had an actual personnel complement at East Point which numbered 14, exclusive of sales personnel. Three had been with the Company (Mike Floyd, Sinclair and Lee), and eleven (Heney, Chaffin, Doyle, DeWitt Floyd, Herrington, Denison, Bowlden, Coker, Ley, Turner and Norton) were former Trans-Air personnel. The Company also sought to retain John Moore as a supervisor, and in the interim, hired Bob Warren as international supervisor. This size complement, i.e. fifteen nonsales personnel, was wholly consistent with the Company's plans and policies. Following the acquisition agreement, the Company planned a "manning scale," i.e. maximum number of employees, at College Park which would consist of a total of 15 personnel exclusive of sales personnel. Eleven were to be former Trans-Air personnel and four Company personnel would be retained. The Company adhered to this plan. The Company determined to retain Mike Floyd, Susan Sinclair, Kathy Lee and John Moore, with the addition of Heney and his staff of 10. As indicated, the Company told the Union at their January 4 meeting that it intended to use only 15 employees to perform the work previously done by 21 employees. After February 10 the Company adhered to the manning scale which took effect on that date (including the addition of Bob Warren, who temporarily replaced Moore). Thus, after Heney hired Greta Newsome as a temporary helper, Hoffenberg instructed him to terminate her because the station had too many employees. In sum, the evidence indicates that the Company would not have manned the College Park facility with more than 15 personnel, including the district manager and the station manager.

As previously discussed, the inference is warranted that if the Company had acted in a nondiscriminatory manner, it would have staffed the College Park facility with the District Manager (Heney), the East Point personnel, exclusive of O'Rorke (Mike Floyd, the six discriminatees and Kathy Lee) together with a sufficient number of former Trans-Air person-

nel to bring the station up to its manning scale. The number would have been six. The inference is further warranted that the Company would have hired the four individuals designated as supervisors, as their titles and responsibilities indicated that they had greater responsibility, ability and expertise than the nonsupervisory personnel. Additionally, they, together with Sue Denison, had more seniority than the other Trans-Air personnel. As indicated, Heney testified, in sum, that he indicated to Denison that seniority would be followed in hiring the Trans-Air employees. It is further likely that in deference to Heney, the Company would have hired Herrington and Chaffin, who were his relatives. In view of Denison's seniority, and the Company's professed need for two customer service agents, the Company probably would have also hired Denison. To fill the remaining slot within its manning scale, the Company probably would have hired one of the Trans-Air driver-dockmen to perform such work, in addition to retaining James McCollum.[42] The remaining four former Trans-Air employees must be considered as replacements for Ashmore, Rozier, Shepherd and McCollum, and cannot be considered in determining the composition of the unit on February 10. As the discriminatees were at least as competent as the former Trans-Air personnel (and in at least some instances, demonstrably more so) the inference is warranted that had the Company acted in a nondiscriminatory manner, there would have been no reason for the Company to raise its manning scale of 15.

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42 Trans-Air had several employees designated as driver-dockmen, and the increased loading capacity at College Park indicates that the Company anticipated more work of this type. However, the Company, unlike Trans-Air, was highly flexible when it came to driving and dock work. The Company utilized its own practice of using owner-operators, and it did so on a larger scale than it had done before. The Company also utilized all of its employees (at least the male ones) to perform all facets of its operations, including loading and unloading, and followed this practice both before and after the acquisition. Thus, the Company assigned the former Trans-Air dockmen-drivers to perform inside office work, either primarily or as needed. Therefore, the evidence does not indicate that the Company would have required more than one former Trans-Air driver-dockman as a unit employee.

Therefore, absent the Company's unlawful conduct, the College Park facility, as of February 10, would have consisted of five supervisors, as that term is defined in the Act, the seven employees who were in the bargaining unit at East Point, and three former Trans-Air employees. In terms of certification, the last ten comprised a bargaining unit at College Park.

In sum, absent the discriminatory conduct, the size and composition of the unit at College Park would not have "fluctuated radically" from that at East Point. see *Ray Brooks, supra* 348 U.S. at 99. The seven unit employees would have been retained, with the addition of three nonsupervisory Trans-Air personnel, in order to accommodate the anticipated increase in volume of business. This would have been more nearly consistent with the staffing pattern followed by the Company throughout the country (e.g. in Minneapolis, which because of its profitability was presumably comparable to Atlanta), the only exception being San Francisco, where the Company retained its own staff and also hired the entire Trans-Air staff. This modest increase in Atlanta did not constitute the kind of change which would have radically altered the composition of the certified unit. As heretofore found, the College Park facility constituted a continuation of the East Point operation. Both were located in the same area, serving the Company's customers through the same airport, functioning in the same manner and performing the same work with the same categories of employee personnel. Absent the discriminatory conduct, the Company would have continued its operation with substantially the same complement of employees.[43] I

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43 Therefore, the present case is distinguishable on its facts from *Fraser & Johnson Co.* v. *N.L.R.B.*, 469 F. 2d 1259, 1264 (C.A. 9, 1972), and *Cooper Thermometer Company* v. *N.L.R.B.*, 376 F. 2d 684, 688-690 (C.A. 2, 1967) cited by Respondent in its brief. Those cases involved the question (essentially speculative, as found by the courts of appeals) of whether employees who had *not* been discriminatorily discharged would have obtained the right to transfer through collective bargaining, or would have accepted such transfer, if the employer had bargained in good faith with their bargaining representative over their right to transfer to a relocated facility. In the present case, the status of the discriminatees were neither negotiable nor open to speculation, because they were discriminatorily fired, and therefore by operation of law, they remained the Company's employees.

find that on and after February 10, the certification covered the employees at College Park. Therefore, since February 10, the Company has been and is the certified collective-bargaining representative of the employees at College Park, as that unit is defined in the certification. Neither the change in location, nor the increase in size of the employee complement, nor the fact that the district manager reports to a Regional Manager in Charlotte, rather than to one in Pittsburgh, constitute the kind of "unusual circumstances" which operate to overcome the conclusive presumption of representative status. A change in location within the same metropolitan area does not vitiate a certification, even when the certification specifically refers to the original location, or even if the employer relocates to a larger facility which may necessitate a larger employee complement. *Saks and Company*, 160 NLRB 682, 684, n. 2 (1966), enf'd *sub nom Retail, Wholesale & Department Store Union* v. *N.L.R.B.*, 385 F. 2d 301, 303-304 (C.A. D.C., 1967); Compare, *R. L. Sweet Lumber Company*, 207 NLRB 529, 534-535 (1973), enf'd 515 F. 2d 785, 794 (C.A. 10, 1975), cert. denied, 423 U.S. 986. Therefore, the Company violated Section 8(a)(5) and (1) by failing and refusing to recognize the Union as the bargaining representative at College Park.

Assuming, *arguendo*, that the certification were not applicable to College Park, I would agree with General Counsel's alternative contention that a finding of a Section 8(a)(5) violation and issuance of a remedial bargaining order would still be warranted under the principles of *N.L.R.B.* v. *Gissel Packing Co., supra.*[44] All of the elements of a *Gissel* violation are present. As of February 10, the Union was the demonstrated representative of a majority of the 10 employees in an appropriate unit, because within the previous year, in a Board-conducted election, the Union had been selected as the repre-

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44 The complaint in Case No. 10-CA-13436 pleads the certification, and alleges that by virtue of Section 9(a) of the Act, the Union is the collective-bargaining representative of the Company's employees. However, the allegation on its face is not based solely on the certification. Therefore, the applicability of *Gissel* is a proper consideration in this case.

sentative of seven of those employees. By virtue of the election, the Union was the exclusive bargaining representative of *all* of the former East Point employees, including Dunn and Lee. Even the Company conceded that it was required to bargain over the effects of the East Point closing, including the effect upon Lee.[45] The Union demanded recognition but its demand was refused. The Company's massive and flagrant unfair labor practices, including the elimination of nearly every union adherent from the bargaining unit, constitutes the kind of conduct which is likely to destroy the conditions for a free and fair choice in a Board election. Compare, *Angle* v. *Sacks*, 382 F. 2d 655, 660-661 (C.A. 10, 1967).[46] Therefore, a bargaining order is warranted.

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All dockmen, drivers and agents employed by the Company at its facility presently located in College Park, Georgia and formerly located in East Point, Georgia, but excluding all

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45 The company suggests that in considering the Union's representative status, I should take into consideration antiunion views expressed by employees, e.g., by Lee. If I were to apply this logic (which is questionable, as the employees were speaking in an atmosphere of coercion and intimidation), I would still have to find that the Union was the representative of a majority of the unit employees. In addition to the five employees who voted for the Union in the election, the Union was vocally supported by Nella Dunn (who was improperly deprived of an opportunity to vote in the election) and by former Trans-Air employee Sue Denison.

46 *Angle* v. *Sacks* involved an application for temporary injunctive relief under Section 10(j) of the Act. However, the description and analysis of the alleged unfair labor practices in that case, in part similar to those in the present case, are pertinent to any *Gissel* inquiry. In the present case, unlike *Angle* v. *Sacks*, the employees have not had the benefit of interim injunctive relief.

sales personnel, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been and is, the exclusive collective-bargaining representative of the Company's employees in the unit described above.

5. By failing and refusing to recognize and bargain in good faith with the Union as the representative of the employees in the appropriate unit, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By discriminating in regard to the tenure of employment of Nella Ree Dunn, Lynn Ashmore, John Moore, Marlin Rozier, John Shepherd and James McCollum, thereby discouraging membership in the Union, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The Company has not violated Section 8(a)(4) of the Act as alleged in the Complaint.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Company has committed violations of Section 8(a)(1), (3) and (5) of the Act, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company discriminatorily terminated Nella Ree Dunn, Lynn Ashmore, John Moore, Marlin Rozier, John Shepherd and James McCollum, it will be recommended that the Company be ordered to offer each of them immediate and full reinstatement to his or her former job, or if it no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings that they may have suffered from the time of their discharge to the date of the Company's offer of reinstatement. I reject the Company's argument that backpay should be tolled in the case of Dunn. If a remedial order has been delayed by reason of the consolidation of these cases, it was justified by the Company's own continuing course of unlawful conduct, which brought about General Counsel's motion for consolidation. An employer's obligation to reinstate a discriminatee does not wait upon an order of the Board or of an Administrative Law Judge. Rather the obligation commences from the time of discharge, and the employer acts at his peril in failing to fulfill that obligation, even when a decision is unduly delayed, or when the employer acts in reliance upon a decision dismissing or recommending dismissal of the complaint, which decision is subsequently reversed. See, *N.L.R.B.* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-265 (1969); *A. P. W. Products Co., Inc.*, 137 NLRB 25, 28-31 (1962), enf'd 316 F. 2d 899 (C.A. 3, 1963). As for John Moore, he may now prefer to remain in his present position. However, he is entitled to make his choice without employer coercion. Therefore he is entitled to an offer of reinstatement to his former nonsupervisory position along with the other discriminatees.

The backpay for the said employees shall be computed in accordance with the formula in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[47] It will also be recommended that the Company be

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47 See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay due. General Counsel's request for interest at 9 percent is, as General Counsel frankly concedes in its supplemental brief, a request that the Board reconsider its decision in *Florida Steel,* regarding the interest rate. So long as *Florida Steel* remains Board policy, I am obligated to follow that policy.

Additionally, I shall direct the Company to recognize and upon request bargain with the Union as the exclusive bargaining representative of the employees in the unit found appropriate herein, to embody any understanding reached in a signed agreement, to furnish the Union with a true and complete copy of the acquisition agreement, to furnish the Union with a complete and accurate list of the names, job classifications and dates of hire of all personnel employed at its Atlanta station, or by Trans-Air, since January 4, 1978, and to post the usual notices. In view of the Company's demonstrated proclivity to furnish false information concerning job classifications, the list must include all personnel, whether in or out of the bargaining unit. The bargaining order shall be retroactive to January 4, 1978, when the Company refused to bargain in good faith with the Union.

In view of the aggravated and serious nature of the unfair labor practices committed by the Company, which are of a character striking at the root of employees' rights safeguarded by the Act (*N.L.R.B.* v. *Entwistle Mfg. Co.,* 120 F. 2d 532, 536 (C.A. 4, 1941), the inference is warranted that the Company maintains an attitude of opposition to the purposes of the Act with respect to the protection of employee rights in general. Accordingly, I shall recommend that the Company be ordered to cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[48]

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48 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the

ORDER

Respondent, Air Express International Corporation, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Truck Drivers and Helpers Local Union No. 728, or any other labor organization, by discriminatorily terminating employees, or in any other manner discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.

(b) Threatening employees with discharge, loss of jobs, loss of pay raises, closure of the Company's facility or other reprisal because of union activity, or warning employees not to engage in such activity.

(c) Promising wage increases in order to induce employees not to support said Union or any other labor organization.

(d) Interrogating employees concerning their union membership, activities or desires, or as to whether they have been subpoenaed to attend a Board hearing.

(e) Creating the impression of surveillance of employee union activity by telling its employees that it has been informed that employees were talking to Board agents, or soliciting employees to refuse to give testimony to Board agents.

(f) Refusing to recognize or bargain collectively in good faith with said Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit: All dockmen, drivers and agents em-

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findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ployed by Respondent at its College Park, Georgia facility formerly located in East Point, Goergia, but excluding all sales personnel, confidential employees, professional employees, guards and supervisors as defined in the Act.

(g) In any other manner, interfering with, restraining, or coercing employees in the exercise of their rights to organize, to form, join, or assist labor organizations, including the above-named labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Offer Nella Ree Dunn, Lynn Ashmore, John Moore, Marlin Rozier, John Shepherd and James McCollum immediate and full reinstatement to their former jobs, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights, and make them whole for losses they suffered by reason of the discrimination against them as set forth in the Section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(c) Recognize and, upon request, bargain collectively with the above-named Union as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Promptly furnish to said Union a true and complete copy of the acquisition agreement between Respondent and Trans-Air Freight System, Inc.

(e) Promptly furnish to said Union a complete and accurate list of the names, job classifications and dates of hire of all personnel employed at its Atlanta station, or by Trans-Air Freight System, Inc., since January 4, 1978.

(f) Post at its College Park, Georgia facility, copies of the attached notice marked "Appendix."[49] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(g) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. March 23, 1979

MARVIN ROTH
Administrative Law Judge

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49 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

[EMBLEM] FORM NLRB—4727 (9-69) [SEAL]

NOTICE TO EMPLOYEES

Posted by Order of The
National Labor Relations Board
An Agency of the United States Government

AFTER A TRIAL IN WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO POST THIS NOTICE AND TO CARRY OUT ITS PROVISIONS.

WE WILL NOT discourage membership in TRUCK DRIVERS and HELPERS LOCAL UNION NO. 728, or any other labor organization, by discriminatorily terminating employees, or in any other manner discriminating against them with regard to their hire or tenure of employent or any term or condition of employment.

WE WILL NOT threaten employees with discharge, loss of jobs, loss of pay raises, closing our facility or other reprisal because of union activity, and WE WILL NOT warn employees not to engage in such activity.

WE WILL NOT promise wage increases in order to induce employees not to support Local 728 or any other labor organization.

WE WILL NOT question employees concerning their union membership, activities or desires, or as to whether they have been subpoenaed to attend a Board hearing.

WE WILL NOT create the impression of spying on employee union activity by telling our employees that we have been informed that employees were talking to Board agents, and WE WILL NOT solicit employees to refuse to give testimony to Board agents.

WE WILL NOT refuse to recognize or bargain collectively in good faith with LOCAL 728 as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All dockmen, drivers and agents employed by us at our College Park, Georgia facility formerly located in East Point, Georgia, but excluding all sales personnel, confidential employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner, interfere with, restrain, or coerce employees in the exercise of their rights to organize, to form, join, or assist labor organizations, including LOCAL 728, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer NELLA REE DUNN, LYNN ASHMORE, JOHN MOORE, MARLIN ROZIER, JOHN SHEPHERD and JAMES McCOLLUM immediate and full reinstatement to their former jobs, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights, and make them whole for losses they suffered by reason of the discrimination against them.

WE WILL recognize and, upon request, bargain collectively with LOCAL 728 as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL promptly furnish to LOCAL 728 a true and complete copy of the acquisition agreement between us and TRAINS-AIR FREIGHT SYSTEM, INC.

WE WILL promptly furnish to LOCAL 728 a complete and accurate list of the names, job classifications and dates of hire of all personnel employed at our Atlanta station, or by TRANS-AIR FREIGHT SYSTEM, INC., since January 4, 1978.

AIR EXPRESS INTERNATIONAL CORPORATION
(*Employer*)

Dated _____ **By** _____
(*Representative*) **(*Title*)**

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 101 Marietta Tower—Suite 2400, 101 Marietta St., N.W., Atlanta, Georgia 30303, (Tel. No. 404-221-2886).

Office - Supreme Court, U.S.
FILED
AUG 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2292

In the Supreme Court of the United States

OCTOBER TERM, 1982

AIR EXPRESS INTERNATIONAL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly found that the relocation of the employer's operations to another nearby facility did not constitute "unusual circumstances" permitting the employer to question the union's majority status during the certification year.

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Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
Section 8(a)(1), 29 U.S.C. 158(a)(1)	3
Section 8(a)(3), 29 U.S.C. 158(a)(3)	3
Section 8(a)(5), 29 U.S.C. 158(a)(5)	3, 9

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2292

AIR EXPRESS INTERNATIONAL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-14) is reported at 659 F.2d 610. A supplemental opinion (Pet. App. B-1 to B-2) is reported at 670 F.2d 512. The decision and order of the National Labor Relations Board (Pet. App. C-1 to C-99) are reported at 245 N.L.R.B. 478.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1982 (Pet. App. B-1 to B-2). The petition for a writ of certiorari was filed on June 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a nationwide air freight forwarding business that transports commodities both do-

mestically and internationally (Pet. App. A–2, C–15). In June 1977, the union[1] filed an election petition seeking to represent dockmen, drivers and agents working at petitioner's facility located in East Point, Georgia, adjacent to the Atlanta airport (*id.* at C–18). Petitioner responded to the union's organizing drive by announcing a wage freeze, by discharging an employee for union activities, and by threatening employees with plant closing and discharge in the event the union won the election (*id.* at A–3 to A–5). The union nevertheless won the election by a vote of 5 to 1 (*id.* at C–18). Petitioner thereafter filed election objections that were overruled by the Board and the union was certified as the bargaining representative on December 14, 1977 (ibid.).

About one month before certification issued, petitioner notified the union that it had entered into an agreement to purchase the facilities and assets of Trans-Air Freight System, Inc., another air freight forwarding company operating in fifteen cities, including Atlanta. Petitioner further advised the union that it was considering relocating its existing Atlanta facility to the Trans-Air facility, which was located on the opposite side of the airport in College Park, Georgia, a distance of approximately 7 to 10 miles from East Point (Pet. App. C–69 to C–70). Formal bargaining sessions between petitioner and the union began on January 4, 1978, and the parties thereafter met on several occasions to discuss the relocation (*id.* at C–69 to C–72). On February 10, 1978, following notification that the Civil Aeronautics Board had approved the Trans-Air acquisition, petitioner moved its Atlanta operations to the new facility (*id.* at C–56). At the same time, petitioner discharged the five active union supporters among its bargaining unit employees. Petitioner hired all the former

[1] Truckdrivers and Helpers Local Union No. 728.

Trans-Air employees and transferred its two remaining bargaining unit employees as well as its entire sales and supervisory staff to the new facility (*ibid.*).[2] The daily operations of petitioner's Atlanta facility remained substantially unchanged following the relocation; petitioner retained the same customers, continued to service the Atlanta airport, and its employees maintained the same job classifications and continued to do essentially the same work as before (*id.* at C–91). After the relocation, petitioner withdrew recognition and refused to bargain with the union as representative of the employees at the new location (*id.* at C–73).

2. The Board found (Pet. App. C–1 to C–4, C–92) that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) by withdrawing recognition and refusing to bargain with the union as representative of the relocated bargaining unit and it ordered petitioner to bargain with the Union.[3] Adopting the decision of the administrative law judge, the Board found that "the College Park facility constituted a continuation of the East Point operation," and it therefore

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[2] Of the 15 cities in which petitioner consolidated its operations with those of Trans-Air, Atlanta was the only location where petitioner discharged full-time employees in favor of Trans-Air employees (Pet. App. C–59).

[3] The Board also found that petitioner violated Section 8(a)(5) by failing to bargain in good faith prior to the relocation (Pet. App. C–78 to C–79); Section 8(a)(1) by, *inter alia*, threatening employees with discharges and plant closures, interrogating employees regarding union activities, promising wage increases to discourage union support, and soliciting employees not to cooperate with the Board's investigation of the case (*id.* at C–94, C–97 to C–98); and Section 8(a))(3) and (1),of the Act, 29 U.S.C. 158(a)(3) and (1) by discharging employees because of their union activities and in order to avoid its bargaining obligation (Pet. App. C–31, C–64). Petitioner does not contest these findings or the Board's remedial reinstatement order (Pet. 6–8).

concluded that the union's certification at East Point covered the employees at College Park (Pet. App. C–91 to C–92; footnote omitted):

> Both [facilities] were located in the same area, serving the Company's customers through the same airport, functioning in the same manner and performing the same work with the same categories of employee personnel. Absent the discriminatory conduct, the Company would have continued its operation with substantially the same complement of employees. * * * Neither the change in location, nor the increase in size of the employee complement, nor the fact that the district manager reports to a Regional Manager in Charlotte, rather than to one in Pittsburgh, constitute the kind of "unusual circumstances" which operate to overcome the conclusive presumption of representative status. A change in location within the same metropolitan area does not vitiate a certification, even when the certification specifically refers to the original location, or even if the employer relocates to a larger facility which may necessitate a larger employee complement.

3. The court of appeals upheld the Board's decision and enforced its order.[4] Relying on *Brooks* v. *NLRB*, 348 U.S. 96 (1954), the court noted that "[c]ertification carries with it an entitlement to one year's presumptive majority status, a presumption irrebuttable absent 'unusual circumstances'" (Pet. App. A–6). The court rejected petitioner's contentions that its restructured regional organization, altered mix of domestic and international business, and physical move of 7 to 10 miles

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[4] The court of appeals made only one minor modification of the Board's order. The court found that the bargaining order should not be retroactive to January 4, 1978, the date of the first failure to bargain in good faith, but rather just to February 11, 1978, when petitioner withdrew recognition from the union (Pet. App. A–13).

amounted to unusual circumstances (*id.* at A–7 to A–8). "College Park is a continuation of East Point" (*id.* at A–12). The court also agreed with the Board that petitioner could not rely on the fact that, because they were unlawfully discharged, a majority of the unit employees did not transfer to College Park. The court explained (*id.* at A–10; citations omitted):

> In the circumstances of this case, * * * the Board is not required to affirmatively demonstrate that each discharged employee would have transferred absent his or her illegal termination. The Board may rely on the presumption that discriminatorily discharged employees remain on with the company. * * * The policy that gives rise to this presumption of continued employment is that a violator of the Act should not be allowed to benefit from its wrongdoing by placing the difficult burden on the Board of proving how individual employees might have acted under hypothetical circumstances.

ARGUMENT

As petitioner concedes (Pet. 9), it is settled law that, absent unusual circumstances, a union enjoys an irrebuttable presumption of majority support for one year following certification. *Brooks* v. *NLRB*, 348 U.S. 96, 98–99 (1954).[5] Petitioner contends, however, that the fact that a majority of the employees at College Park

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[5]As the Court noted in *Brooks* (348 U.S. at 98–99; footnotes omitted), unusual circumstances have been found where "(1) the certified union dissolved or became defunct; (2) as a result of a schism, substantially all the members and officers of the certified union transferred their affiliation to a new local or international; (3) the size of the bargaining unit fluctuated radically within a short time." And see *NLRB* v. *Lee Office Equipment*, 572 F.2d 704, 706 (9th Cir. 1978) (abandonment of union by employees not unusual circumstances).

are not from East Point constitutes unusual circumstances justifying its withdrawal of recognition. There is no merit to this contention.

Petitioner cites no case where similar facts have been considered "unusual circumstances" sufficient to overcome the *Brooks* presumption. None of the cases that petitioner relies upon deal with the question of a bargaining obligation after a relocation during the certification year.[6] This factual distinction, ignored by petitioner, is crucial.

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[6] *Westwood Import Co.*, 251 N.L.R.B. 1213 (1980) (Pet. 9), dealt with the effect of the Board's contract bar rule, which precludes questioning majority status during the term of a collective agreement, in a relocation context. *Westinghouse Electric Corp.*, 174 N.L.R.B. 636, 637–638 (1969) (Pet. 9), not only was not a certification year situation, the case did not involve a relocation but rather a new plant where the union was required to establish its majority status. In *Coated Products, Inc.*, 237 N.L.R.B. 159, 161 (1978), enforced, 620 F.2d 289 (3d Cir. 1980) (Pet. 9), the relocation occurred more than 10 years after the expiration of the certification year. *NLRB* v. *Burns International Security Services*, 406 U.S. 272 (1972), and *NLRB* v. *Pepsi-Cola Bottling Co.*, 613 F.2d 267 (10th Cir. 1980) (Pet. 9–10), are successorship cases wherein the successor employer has no obligation to assume the predecessor's bargaining obligation where it does not have a majority of the predecessor's employees. They do not deal with the obligation of the same employer in a relocation context.

The cases upon which petitioner relies (Pet. 8 n.6, 10–18) for its assertion of a conflict among the circuits are similarly inapposite because none involve a certification-year relocation. In *Cooper Thermometer Co.* v. *NLRB*, 376 F.2d 684 (2d Cir. 1967), the relocation occurred after the parties had enjoyed a 30-year bargaining relationship. In *Fraser & Johnston Co.* v. *NLRB*, 469 F.2d 1259 (9th Cir. 1972), the unions involved had been representing employees for 25–30 years at the time of the relocation. Finally, in *NLRB* v. *National Car Rental System*, 672 F.2d 1182 (3d Cir. 1982), the bargaining relationship was over 10 years old when the employer relocated its facility.

During the certification year it is immaterial whether a union in fact retains its majority status; as a matter of law the union's majority status is irrebuttably presumed. *Brooks* v. *NLRB*, *supra*, 348 U.S. at 98; *NLRB* v. *Burns International Security Services*, *supra*, 406 U.S. at 279 n.3. See also *NLRB* v. *Louisiana Bunkers, Inc.*, 409 F.2d 1295, 1299 (5th Cir. 1969). After the certification year passes, however, the presumption becomes rebuttable and loss of actual majority status will abrogate the employer's bargaining obligation. See, *e.g.*, *Brooks* v. *NLRB*, *supra*, 348 U.S. at 104; *NLRB* v. *Burns International Security Services*, *supra*, 406 U.S. at 279 n.3. Cases holding that an affirmative showing of continued majority status is required in a post-certification-year relocation are thus plainly inapposite when, as here, the relocation occurs during the certification year period when the union's majority status cannot be contested.

Petitioner's contention (Pet. 18–20) that "the Board abused its discretion" by issuing a bargaining order when a majority of the employees at College Park might not support the union is therefore precluded by *Brooks* v. *NLRB*, *supra*. Lack of majority status during the certification year does not defeat the employer's obligation to bargain with the certified union.[7] Moreover, to the extent that petitioner is relying on the

[7] Thus, as the court below observed (Pet. App. A–12 n.11), the only real issue in the case is "whether in the light of all the facts the bargaining unit remains the 'same' or is now a 'different' one." Accord: *NLRB* v. *Louisiana Bunkers, Inc.*, 409 F.2d 1295, 1299 (5th Cir. 1969) (relocation during certification year). Here, the relocation resulted in no significant changes in the bargaining unit; the employees retained the same job classifications and continued to do essentially the same work, and the moderate increase in bargaining unit size from seven to eleven employees did not present the sort of "radical fluctuation" necessary to justify a refusal to bargain under the standard enunciated in *Brooks* v. *NLRB*.

right of its employees to reject representation, it is relying on a right that no employee has asserted. "To allow employers to rely on employee's rights in refusing to bargain with the formally designated union is not conducive to [industrial peace], it is inimical to it." *Brooks* v. *NLRB*, *supra*, 348 U.S. at 103.

Finally, even if a showing of majority support were required, the Board and the court of appeals properly concluded that, but for petitioner's unlawful actions, the discharged union adherents would have transferred to College Park and the union therefore would have retained its majority status.[8] Contrary to petitioner's assertion (Pet. 10–18), the court of appeals properly relied on the presumption that, in the absence of evidence to the contrary, discriminatorily discharged employees remain in the bargaining unit.[9] As this Court stated in *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 687 (1944), an employer:

> [C]annot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by

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[8] Absent the discriminatory discharges, seven of the eleven bargaining unit members at College Park would have come from East Point (Pet. App. A–10).

[9] The presumption applies with particular force to the facts of this case. The relocation here simply resulted in a move of petitioner's operations from one side of the Atlanta airport to the other, a distance of only 7 to 10 miles. All employees except those who were unlawfully discharged transferred to the new facility. The record, moreover, shows that one of the discriminatees later accepted a nonbargaining unit position at the new facility (Pet. App. C–57) and that at least two others subsequently applied for positions there (Tr. 998, 907). On this record, it was clearly not unreasonable to conclude that, absent the unlawful discharges, all the bargaining unit employees would have transferred.

> its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will.

And see *K.B. & J. Young's Super Markets, Inc.* v. *NLRB*, 377 F.2d 463, 466 (9th Cir.), cert. denied, 389 U.S. 841 (1967). *Cf. NLRB* v. *Houston Distribution Services, Inc.*, 573 F.2d 260, 267 (5th Cir.), cert. denied, 439 U.S. 1047 (1978).[10]

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[10] Petitioner's reliance (Pet. 13–17) on *Fraser & Johnston Co.* v. *NLRB*, *supra*, and *Cooper Thermometer Co.* v. *NLRB*, *supra*, is misplaced. Neither of those cases involved employees who were ordered reinstated because they had been unlawfully discharged. In *Cooper Thermometer Co.*, *supra*, 376 F.2d at 689–690, the unfair labor practice was the employer's unlawful refusal to bargain about the relocation and the court noted that the employer did not violate the Act by not transferring the employees at issue, but only by refusing "to talk in good faith." Similarly in *Fraser & Johnston Co.*, *supra*, 469 F.2d at 1260, the employer violated Section 8(a)(5) of the Act by failing to bargain about a relocation. In those circumstances, it cannot be said that "the absence of the union's majority status at the new plant has been caused by the company's unfair labor practices" (*id.* at 1265). Moreover, in both *Cooper Thermometer Co.* (376 F.2d at 690) and *Fraser & Johnston Co.* (469 F.2d at 1265), the evidence indicated that many of the employees would not have transferred to the new facility. In *NLRB* v. *National Car Rental System*, *supra*, 672 F.2d at 1194–1195, the court did refuse enforcement of a bargaining order where employees had been unlawfully denied an opportunity to transfer to a new location. As noted above (*supra*, note 6), however, the certification year had expired there and the union's continued right to represent the bargaining unit was accordingly dependent on majority status.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1982